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To the Members of the Mississippi State Bar Association:

The officers of your Association sincerely hope that all of the members will attend the annual meeting at Meridian in May. There will be matters of much importance placed before the Association, and if the Association is to function properly it is essential that a large membership be present at this meeting.

Secretary-Treasurer earnestly requests those members who have not yet paid their 1931 dues to send in their checks as soon as possible. Please make checks for dues payable to the Mississippi State Bar Association.

You will find in this issue of the Journal an application form for membership in the State Bar Association. If there are any lawyers in your community who are not members of the Association and whom you can recommend, we hope that you will use this form and increase the membership of the Association. Have the applicant send in this form with a check for $5.00 and he will be entered on the membership roll.

Yours very truly,

Louis M. Jiggitts

Secretary-Treasurer
Mississippi State Bar Ass'n.

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MISSISSIPPI LAW JOURNAL

JOURNAL of the MISSISSIPPI STATE BAR ASSOCIATION

Vol. III MAY, 1931 No. 4

THE HIGH-LIGHTS OF THE GREAT SANHEDRIN

By Gabe Jacobson,*

In the administration of law, as in all other endeavors of human progress, the continuous changes demanded by the times are ever present. We quickly cast aside the old and take on the new. There was, perhaps, never a time in the history of our country more than now, when the general feeling of unrest has brought about such disrespect for our existing institutions, and while we consider changes, especially in the law, it is advisable that we should occasionally stop and think of and consider the lessons of the past; lest we forget some of the valuable lessons of antiquity. All that is old is not necessarily good; but because it is old is not sufficient reason for discarding it. It has occurred to me that when our attention is turned to ancient legal systems, that it would be of interest to the law fraternity to bring before it some of the procedure of Hebrew courts, which have not existed since A. D. 70.

Sanhedrin is a Hebrew-Aramaic term originally designating only the assemblage at Jerusalem that constituted the highest political, administrative, legislative, religious, and judicial magistracy in the country sitting as a Jewish Court.

The word "Sanhedrin" is derived from the Greek and denotes a legislative assembly or an ecclesiastical council deliberating in a sitting posture. Several other names are also found in history to designate the Great Sanhedrin of the Jews. "The Council of Ancients" is a familiar designation of early Jewish writers. It was also called "Grand Council", and sometimes called the "Tribunal of the Maccabeans".

Whether it had its origin through the advice given to

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Moses by his father-in-law, Jethro, or came into being a year later, is a matter concerning which biblical expositors are divided. That a permanent national senate was created at a later period is maintained very generally by Jewish writers. Others claim that this senate continued with very short interruptions from the time of Moses until the Babylonish captivity, and was revised and reorganized on more definite principles after the return of the Jews to Jerusalem.

When we consider the different theories as to the origin of the Great Sanhedrin, we may conservatively say that the concensus of opinions leads us to believe that it was established in the wilderness by Moses, who acted under divine guidance as was recorded in Numbers XI:16-24, as follows: "Gather unto me seventy of the elders of Israel, whom thou knowest to be elders of the people, and officers of them; and bring them unto the tabernacle of the congregation, that they may stand with thee, and I will take of the spirit that is upon thee and will put it upon them; and they shall bear the burden of the people with thee, that thou bear it not alone."

Brushing aside mere theory and speculation as to when it had its origin, one historical fact is clear and uncontradicted, and that is, the Sanhedrin council clothed with the general judicial and religious attributes of the "Great Sanhedrin" was a regular organized court from 200 B. C. until the destruction of the Temple in Jerusalem in 70 A. D., when it perished with the destruction of Jerusalem. And it goes without saying that the Hebrew laws are the product of a long development. They begun as primitive customs, which were gradually ameliorated with the progress of time.

In this article, only one branch of the Sanhedrin courts will be considered, and that will be the Great Sanhedrin Court sitting as a criminal court, hearing capital offenses.

Hereinafter reference is often made to the Talmud, and it seems to me appropriate to now make a brief explanation of the nature and character of the writing contained in what is known among Hebrew scholars as the Talmud.

In order for one to clearly understand the penal code of the Hebrews he cannot, alone, depend on the Pentateuch; but must turn to the Talmud, which was to the ancient Hebrews a compendum of their literature, the storehouse of their traditions, the exponent of their faith, the record of their acquirements, the handbook of their ceremonials, and the summary of their legal code, civil and penal. What we

call the Mosaic Code as embodied in the Pentateuch furnished to the children of Israel the necessary source of the law and justice; but for ancient traditions we must look to the Rabbinic interpretations, which were contained in the Talmud and supplied the needed rules of practical application. The contents of the Talmud were not proclaimed to the world by any executive, legislative, or judicial body; they were not the result of any resolutions or mandate of any congregation, college or Sanhedrin, they were not, in any sense formal or statutory. They were simply a great mass of traditionary matter and commentaries transmitted orally through many centuries before being finally reduced to writing.

The Pentateuch, or what is known as the Mosaic Code, was the written law and the foundation of ancient Hebrew Jurisprudence. The Talmud was the commentaries of the law or oral law connected with, derived from and built upon the written law of the Pentateuch. To state it differently; it may be said, that the Mosaic Code as embodied in the Pentateuch was the lex scripta, and the Talmudic commentaries and provisions was the lex non scripta of the Commonwealth of Israel.

It would be somewhat inaccurate to speak of the Talmud as a book, it is rather a small library or collection of books, and it is said that an English translation of the Talmud with its commentaries would make a library of 400 volumes, each numbering 360 octavo pages.

The Great Sanhedrin was the supreme trial court in Jerusalem, composed of seventy-one members including a President and Vice-President. The proceedings of the Great Sanhedrin were directed by these two presiding officers. One of which styled "Prince" was the president of the court, and the other known as the "Father of the Tribunal" was the vice-president. The presidency of the council went to him who surpassed his colleagues in wisdom. This is asserted in the Constitution of the Sanhedrin. The remainder of the members composing the Great Sanhedrin was equally divided in three chambers:

Twenty-three in the chamber of priests;

Twenty-three in the chamber of scribes;

Twenty-three in the chamber of elders.

The first of these orders represented the religious or sacerdotal; the second, the literary and legal; the third, the patriarchal, the democratic or popular element of the Hebrew population. Thus, the principal estates of the

commonwealth were present by representation in this supreme court and the parliament of the nation.

Its jurisdiction was a very wide one, covering an extensive field of religion as well as purely legal cases. In our modern system, the states through their representatives are the prosecutors or accusers. In the Jewish law the duty of accusing lay upon every citizen who witnessed the crime. In civil law, where in spite of the religious background, the offense was a private nature, the party injured started the trial. In criminal cases, religion acting through every member of the faith, assumed the roll.

The entire machinery of the law having been placed in the hands of the learned, or the Priest who for a long time were identical with that class, and religion assuming the place of the state, there were laws enacted embodying the tender mercies accorded to the accused. The King had little judicial power; he was rather in the capacity of executive than judge. The laws were binding for him as for any other subject. The king was not considered as in Ancient Rome or in Mediaeval Europe the source of law. On the contrary, the later Talmudic authorities state that if the king's commandments conflicted with a certain legal or religious law, it was null and void. The king or sovereign did not have any voice or influence in the appointment of the judges, nor could he interfere in any way with the organization of the various tribunals, nor in the election of the judges. The people only had the right to nominate the members of the Sanhedrin. The science of legal administration was based on the representative system, and what we should now days term "universal sufferage."

While the judges were elected to the lower tribunal or Lesser Sanhedrin by the people, the Great Sanhedrin had in charge the appointment of judges from the Lesser or Lower Sanhedrin to the Great Sanhedrin in case of vacancies. The Great Sanhedrin had jurisdiction over all capital offenses. Its jurisdiction was universal and stretched over the whole land. Neither king nor prince was beyond its jurisdiction. It had original jurisdiction in all matters. A non-compliance with its judgment or refusal to carry out its mandates was punishable by death. An elder or judge who taught in contravention to the decisions of that august council was by the Mosaic Code to be condemned to die.

With regard to the civil matters, it was the supreme court of appeals, and in regard to the criminal matters, a tribunal conducted for the trial of all offenses that were committed by men in any public station, or that affected

the peace or majesty of the people. Appeals were allowed from a minor Sanhedrin to the Great Sanhedrin, but there was no appeal from a mandate or judgment or decree of the Great Sanhedrin. Its authority was supreme in all matters, civil, political, social, religious, and criminal.

Every Jew, if he but possessed high intellectual and moral qualifications, was qualified to sit in the civil court. The qualifications for the judgeship in the criminal court was much higher. The candidates for that office had to be of full blood Jewish parents, members of noble families, such as were able to form alliances with priests. In addition they had to be free from bodily defects, and of an impressive physique. They had to be great scholars. The required age for a candidate was forty years. On the other hand very old age was a disqualification. One who had no children or who was extreme in his temperament, either too harsh or too kind-hearted was also disqualified.

In the number of its members, in the requisite of learning, courage, character and impartiality for such membership in the nature of its jurisprudence and detail of its procedure, it surpassed any like assemblage which has ever administered the laws in any nation. No more dignified or learned body has ever interpreted or administered justice to man.

Under the system of the government every Jew might aspire to the dignity of a judge; but to prevent any but competent and qualified persons from being appointed to the various tribunals ample precautions were taken. It was not, however, necessary in the care of the provencial or Lesser Sanhedrin to guard against sheer inefficiency, for no Israelite could have been absolutely ignorant of the law. It must be remembered that education was well advanced among the Hebrews. A system of compulsory instruction was in force. There was a school board for each district. Every child more than six years of age was obliged to attend the communal school unless receiving private lessons at home from qualified tutors. Such importance does the Talmud attach to the training of the young that it enters into the minutest details upon the subject. From his earliest years the Jewish boy was a diligent student of the Bible; it was his primer and reading book. Its laws and traditions were also as familiar to him as his own existence; they formed part and parcel of his every day experience. In riper manhood he attended each evening after labor the exposition of the Scriptures. On Sabbath, on festivals, and on the morning of Mondays and Thursdays he was present

as a religious duty at the public reading and interpretation of the law. The Jew, therefore, could not but be well acquainted with the leading principles of his legal court and their general application. He was, in fact, competent to decide any ordinary infraction of law likely to occur in his own district. But to become a member of the Sanhedrin having an extensive criminal jurisdiction, to be qualified to act as judge in a trial involving the life or death of a fellow creature was another matter. Here legal acumen, proved ability, sound knowledge, and unquestioned integrity was required. Only such men who already served as judges in the lower court and were learned in the law, and versed in science and logic might be admitted into the Sanhedrin of Jerusalem, the Supreme Council of the Nation. The standard of qualification was necessarily high in every particular. Accordingly, when a mandate from the capital authorized the formation of a great tribunal in a town, the residents took every precaution to nominate such men whose ancestry required guarantee and fitness for the position they were to occupy. The election of representatives who were not qualified was followed by refusal of a certificate of legality from the Great Sanhedrin. From the provencial Sanhedrin promotions were made as vacancies occurred in the higher court as stated above.

Judges of the Great Sanhedrin were required to have qualifications, viz: He must have been learned in the law, both written and unwritten. He must have been intimately acquainted with the legal code, its traditional practices, the precedents of the colleges and the accepted decisions of former judges. He was required to know not only the law applicable to the times in which he lived, but also of times which were no longer in effect.

He must have had judicial experience; that is, he must have already filled three offices of gradual increased dignity, beginning with one of the local courts and passing successfully through magistrates at Jerusalem.

He must have been thoroughly proficient in scientific knowledge, astronomy, medicine, chemistry, and familiar with the arts of the necromancer. He must have been an accomplished linguist; that is, he must have been thoroughly familiar with the languages of the surrounding nations. It was absolutely necessary that at least four members of the court should understand the language of any stranger, and two of those must have been able to converse in the language of the former.

He must have been modest, of good repute among his

neighbors, of good appearance, and free from haughtiness. He must have been pious, strong and courageous, and of intellectual acumen, and logical powers to be employed on behalf of those who were accused of crime, whose advocates the judges themselves were.

A man was disqualified to act as judge who had not, or had never had any regular trade, occupation or profession by which he gained a livelihood.

The ancient Hebrews said: "He who neglected to teach his son a trade is as though he taught him to steal."

A man who did not work and had never labored in the sweat of his brow for an honest livelihood was not qualified, reasoned the Hebrew people, to give proper consideration or extend due sympathy to the cause of litigants whose difficulties arose out of the struggles of everyday life.

In trials where death penalties might be inflicted, a bastard or person who had never had any children of his own were disqualified to act as judges. No man who was concerned or interested in a matter to be adjudged was qualified to sit in judgment thereon. All relatives of the accused man of whatever degree of consanguity were disqualified from sitting in judgment on a case. No person who would be proved as heir, or otherwise, by the death or condemnation of an accused man was qualified to be his judge. The king could not be a member of the Sanhedrin. An aged man, because his years and infirmities were likely to render him harsh, perhaps obstinate and unyielding, could not be a member of the Sanhedrin. Under no circumstances was a man who was known to be at enmity with the accused principal permitted to occupy a position among the judges. Such enmity was presumed to exist when a judge as a result of ill feeling had not spoken to the person charged with any offense for a period of more than three days.

At first judges of Israel were not paid anything for their services. The honor of the office itself was considered full emolument for the labor performed. Indeed, the office of judge in Israel was so highly prized that the struggles of a lifetime were not considered too great to pay for a place in the Great Sanhedrin. Such high station was regarded as a sacred sphere and that the idea of mutual gain should not enter, and it was the hope and ambition of every father and mother that their son would become so wise and honorable as to become a member of the Great Sanhedrin Court. But in later years of the national life, a change seems to have taken place. The ancient rule was so far modified

that when the services of the judge were required on days when he was engaged in his private pursuits, custom and law gave him the right to claim a substitute during the time he was occupied on the bench; or, in default of the substitute, to claim remuneration for the time he had lost. Another modification was that if his legal duties required his entire time, the judge in Israel was entitled to support from the common treasury and was even permitted to accept fees from litigants. This practice was discouraged, however, by the Rabbis who looked with disfavor upon the appointment of the judges who were not entirely able to support themselves.

The Hebrew mind conceived modesty to be the natural result of that learned dignity and piety that every judge was supposed to possess, and, therefore, he was required to be a modest man. He was required also to be a popular man, but this qualification of popularity,—it was wisely said by a noted writer,—did not convey the note of electioneering, hobnobbing, and familiarity. It meant simply that the reputation of the applicant for judicial honor was so far above reproach that his countrymen could and would willingly commit all their interests of life, liberty, and property to his keeping. By good appearance was meant that freedom from physical blemishes and defects, and that possession of physical endowment that would inspire respect and reverence in the beholder. The haughty judge was supposed to be lacking in the elements of piety and humility which qualified him for communion with God. And finally it may be added that an election to a seat obtained by fraud or any unfair means was null and void. No respect was shown for the piety or learning of such judge. His judicial mantle was spat upon with scorn, and his fellow judges fled from him as from a plague or pest. Hebrew contempt for such a judge was expressed in the maxim: "The robe of an unfairly elected judge is to be respected not more than the blanket of an ass."

Being the aim and hope of every Jewish parent that they may have reared a son, who would be qualified to sit as a judge in the Sanhedrin Court, made this pride of parents a continual stimulus, which caused every ambitious young Jewish man to aspire to this high honor.

The other grounds for disqualification of person to become a member of the Sanhedrin Court were equally exacting, and among those other causes for disqualification are these: All who made money by dice playing, by any games of hazard, by betting on pigeon-matches and similar ob-

jectionable practices, were not only incapable of becoming members of the tribunal, but were not permitted to give evidence in a trial. A man who gained money by the amusements named was regarded as actually dishonest. A Jew who was in the habit of lending money on usuary was in like manner disqualified. The disqualification extended not only to those who took usuary of the brethren, but even to cases where the money had been loaned to one of another religion or a heathen. Nor could a slave dealer sit as a judge. The Talmud stigmatised such a person as inhuman and unfeeling, and, therefore, incapable of deciding any issue involving the life or liberty or even property of another.

When, therefore, the Talmud insisted upon a high standard of qualification for the members of the Sanhedrin, it was animated not alone by a due and proper regard for the dignity of the judicial office, but a merciful consideration for the offender, and a desire to secure for the accused, one whom they looked upon as an unfortunate brother, the advantage of qualified and skillful and learned counsel.

The basic principle of the Jewish law was that any violation against the commandments or precepts of God, as expressed in the Scriptures, was a punishable act. In it, the notion of crime was not distinguished from sin.

The prosecutor attended before the Sanhedrin and lodged his complaint. The officer appointed by the court for that purpose sought the accused person and brought him before the tribunal. The witnesses were summoned and heard. The judges performed the duties of both judge and jury. The provisions of the law in the modern sense of the term was no part of the judicial system of the ancient Hebrews. The judges and disciples performed all the duties of the modern attorney and counsellor at law. The prophets were the sole orators of Hebrew life, but they were never allowed to appear in court as defenders of the accused. There was no such officer as public prosecutor or State's Attorney known to the laws of the ancient Hebrews. The witnesses to the crime were the only prosecutors required by Hebrew criminal jurisprudence, and in capital cases they were the legal executors as well. There was no such body as the modern grand jury known to the Hebrew law, and no similar body or committee of the Sanhedrin performed the accusatory functions of the modern grand jury. The witnesses were the only accusers and the testimony was both the indictment and the evidence. Until they testified

the man suspected was deemed not only innocent, but unaccused.

The crime of false swearing required special notice—Talmudic construction of this law awarded the same kind of death to him who had sworn falsely against his brother that would have been meted out to the alleged criminal, if the testimony of the false swearing had been true.

The accuser and the accused stood during the trial and the judges sat. The court, however, had the right to allow one of the parties to sit down. In regard to the order of cases on the calendar, the order of arrival was followed. However, some exceptions were allowed in regard to orphans, widows and scholars. The cases of orphans preceded all others; the widows cases drew precedence over the scholars, and the scholars over ordinary cases.

When the parties appeared in court the trial began. After the testimony was heard, the argument of each of the parties had to be produced in the presence of both of them. The judges had no right to hear one party without the other. The judges during the argument were supposed to be silent listeners. They had no right to interfere even when one of the parties did not follow the rules of the court, and for instance, should one party bring only one witness, the judge could not confuse him by saying one witness is not sufficient. The judge, however, was allowed to help a party if for any reason he could not state his argument accurately. The arguments had to be delivered orally. With the consent of the parties the court clerk took the arguments down in order that the litigants might not change them later. The cost of employing clerks was covered by both parties. No one could speak against the accused, but argument could be made in his favor. If the judge understood the language spoken by the parties, but could not answer in the same language, he was allowed to use the services of an interpreter.

At the close of the morning sacrifice the members of the court entered the judgment hall in solemn procession. They took their seats, turbaned, on cushions or pillows in Oriental fashion, with crossed legs and unshod feet, in a half circle. The High Priest sat in the center with other members of the court to the right and left of him. His head was crowned with a turban of blue inwrought with gold. On his bosom hung the priestly breastplate in which glittered twelve precious stones, emblematic of the twelve tribes of Israel. A flowing robe of blue, gathered about his waist by a girdle of simple scarlet and gold embroidery enveloped

his person and set off the pure white linen of his capacious sleeves. The buttons of this costly robe were onyx stones. His slippered feet were half concealed beneath the long fringe of his priestly vestments, which were curiously embroidered with pomgranites in gold, scarlet and crimson. No pontiff of any religion ever wore robes more resplendant than those in which the high priest were attired on public and state occasions.

Immediately in front of the semi-circle of judges sat three rows of disciples, every row numbering three and twenty judges; thus every judge was assisted by his three juniors. The disciples were by no means young and inexperienced students, but were none of them in anywise inferior to the members of the court itself.

As has already been said, any vacancies in the first row were filled up from the second, and the second was recruited from the number of learned men to be found in every place having a permanent Sanhedrin. Three scribes were present; one sat on the right, one on the left, and the third in the center of the hall. The first recorded the names of the judges who voted for the acquittal of the accused and the arguments upon which the acquittal was grounded. The second gave the names of such who decided to condemn the prisoner, and the reasons upon which the conviction was based. The third kept an account of both sides so as to be able at any time to supply omissions or check inaccuracies in the memorandum of his fellow members. In addition to these there were still others who exercised sentences and attended to all the police work of legal procedure. The accused was placed in a conspicuous position where he could see everything and be seen by all. Opposite to him in full view of the court were the witnesses. Thus organized and so arranged, the judges of the Sanhedrin commenced to consider the cases before them.

If the defendant was summoned to court several times and refused to come, testimony was accepted in his absence. No testimony was given at night, and the court held no night session as it was considered that the judges would be too fatigued to give the trial the careful consideration it deserved, and no trial begun the eve before a religious holiday.

Before the witnesses testified there was an admonishment to them to tell the truth and to give all the information they possessed. This was done publicly. They were examined one by one. In capital cases the only evidence effective which Jewish law took cognizance was that testified

to in open court by witnesses, but documentary evidence was used in civil cases. The judges could not convict any one in a capital case on the strength of his own testimony. The act must have been seen by both witnesses simultaneously, and they must have seen each other. Every adult Jew of the male sex of religious and moral integrity not related to the accused nor to the judge, could be a witness in a capital cause. The witnesses were subjected to the strictest and severest examination. Strong admonition to the witnesses was announced; they were threatened and warned that the blood of the accused would rest upon them and upon their children. The testimony was given orally in a language understood by the court. The examination was conducted in public in the presence of the accused and in the presence of the whole court. Before the witnesses came before the court they were first conducted in private by judges deputized for that purpose, where a preliminary examination was had. All testimony not in accordance with laws of evidence was immediately declared inadmissable and could not be deposed to in open court. Hence, in all cases where discrepancies were discovered during the preliminary investigation, the statements of the witnesses were not submitted to the judges. That is, the committee appointed took the witnesses in private before the trial and heard their testimony and cautioned them about giving any testimony which was considered incompetent or not admissable, so that when they testified before the whole court no incompetent or inadmissable evidence was heard by the judges who heard the case. There was, therefore, no possibility of the Sanhedrin being prejudiced or influenced by any testimony that failed to satisfy the rules of evidence. To procure the condemnation of an accused person, two competent witnesses independent and not related were absolutely necessary. No evidence as to the prisoner's antecedents was admitted. No previous conviction might be urged against him. No proofs of character, good or bad, were allowable. Extenuating circumstances were noted but only by the judges. In no case was a witness permitted to make a statement for or against the accused. The evidence was strictly confined to replies elicited in response to leading questions from the judges. Hearsay and presumptive evidence was rejected as worthless, and circumstantial evidence was inadmissable.

The rules of evidence as formulated in the Talmud are of a remarkable character. They are in most respects unlike those of any ancient legal code, and are diametrically op-

posed to our modern practice in every important particular. The primary object of the Sanhedrin was to render convictions of an innocent person impossible. All the ingenuity of the Jewish legist was directed to attainment of this end. Everywhere the punishment of the guilty seemed subordinate to this principal consideration. The credibility of witnesses must be established beyond doubt; their impartiality must be placed above suspicion. The likelihood of prejudice animating any person testifying against the prisoner must be carefully sought out.

No person could incriminate himself, nor could the wife give evidence against her husband. On the other hand, a person was not debarred from testifying in his own behalf. Any argument he wished to urge irrespective of its legal worth was heard by the judges. And while under Hebrew law the accused was never compelled to testify against himself, he was permitted and encouraged to offer testimony in his own behalf. His confession of guilt was accepted in evidence and considered in connection with other facts and circumstances in the case, but was never permitted standing alone to form the basis of a conviction unless it was corroborated by two other witnesses.

It was considered that a confession could be made as a result of weakness or of folly or of interest. For some weak-minded people unable to support the torture of a harassing examination and eager to regain their liberty, might make a full confession, accusing themselves in order not to be indicted, and was likened to the person who crossed a turbulent stream on a small log, threw himself through nervousness into the rushing water in trying to prevent a fall. And fools from a want of responsibility, or through a boastful nature might answer or confirm or confess everything of which they know nothing.

It was settled under the Talmudic law that whoever would not tell the truth without swearing to it would not scruple to assert falsehood under oath, so no oath was required in the modern sense. All testimony was given under a solemn sanction of the ninth commandment: "Thou shalt not bear false witness against thy neighbor."

The following are the remarks of the presiding officer of the Sanhedrin to the witness:

"Forget not, O witness, that it is one thing to give evidence in a trial as to money and another in a trial for life. In a money suit, if thy witness-bearing shall do wrong, money will repair that wrong. But in this trial for life, if thou sinnest, the blood of the accused and the blood of his seed to the end of time shall be

imputed unto thee. . . . Therefore was Adam created one man and alone, to teach thee that if any witness shall destroy one soul out of Israel, he is held by the Scripture to be as if he had destroyed the world; and he who saves one such soul to be as if he had saved the world. . . . For a man from one signet ring may strike off many impressions, and all of them shall be exactly alike. But He, the King of the kings of kings, He the Holy Blessed, has struck off from His type of the first man the forms of all men that shall live, yet so that no one human being is wholly alike to any other. Wherefore let us think and believe that the whole world is created for a man such as he whose life hangs on thy words. But these ideas must not deter thee from testifying to what thou actually knowest. The Scripture declares: 'The witness who hath seen or known, and doth not tell, shall bear his iniquity.' Nor must you scruple about becoming the instrument of the alleged criminal's death. Remember the Scriptural maxim: 'In the destruction of the wicked, there is joy.' " (Benny—Criminal Code of the Jews.) From "The Trial of Jesus Christ" by A. C. Bisek.

With regard to witnesses, puberty or adolescence marked the age which qualified a person to be a witness in a criminal case; that is, the thirteenth year must have been passed.

With regard to the requirement that two eye witnesses must testify as to overt acts, this was taken from the Mosaic ordinance referring to the rule, thusly: "At the mouth of two witnesses, or three witnesses shall he that is worthy of death be put to death, but at the mouth of one witness he shall not be put to death." Deut. 17:6. "Whosoever killeth any person, the murderer shall be put to death by the mouth of witnesses, but one witness shall not testify against any person to cause him to die." Numbers 35:30.

The witnesses were required to agree in all essential details, else their testimony was invalid and had to be rejected. This only applied in criminal cases.

The deliberation of the judges opened with an argument for the defense. It was opened by the youngest of the judges. This was done so that the opinion of the youngest member of the court would not be overawed by the judgment of the older and mature members; that is, so each judge would give his independent opinion in their arguments for the defense. A voice was granted to the candidates in the rows, but not for condemnation. Witnesses were not allowed to advance arguments for the defense, but the accused could, if he wanted to do so.

Had one of the court members gone on record on the side of the defense, he could not retract his statement and

change his opinion for condemnation. Had he argued for condemnation he could change to the defense. There was no difference whether the change was during the argument or the taking of the decision; the same rule held good.

In giving the decision the reason for voting had to be furnished, the one vacillating in his opinion need not furnish any reason for so doing. If one of the defenders erred in giving his reason for acquittal, the secretary reminded him of that fact. If this happened to one who found the accused guilty, the secretary was silent. The deliberations could only begin with an argument in favor of the accused. Nothing was therefore urged until one of the judges found some fact or facts telling against the prosecuted. The members of the Sanhedrin then arose and alluding to the circumstances, said: "According to such and such statement, it appears to me that the prisoner must be acquitted." The discussions thereupon were general.

The high priest, who was generally president of the Sanhedrin, addressed a gentle admonition to the youngest member, who was never less than forty years of age, to render a free and untrammeled verdict, and not to be awed or influenced by the patriarchs of the court. This admonition was repeated in the case of each junior member of the tribunal. When the balloting commenced each judge arose in his place and voted. At the same time making a short speech explanatory of his ballot. To secure a conviction it was not necessary that the vote of the members of the Sanhedrin should be unanimous. Indeed a peculiar rule of Hebrew law provided that if the verdict was instantaneous and unanimous, it was invalid and could not stand. If the prisoner had not a single friend in court the element of mercy was wanting in the verdict, said the ancient Hebrews, and the proceedings were regarded in the light of conspiracy and mob violence. The majority of in his favor would acquit. Any majority amounting to two or more that did not reach unanimity was sufficient to condemn, and it was further regarded by ancient Hebrew law that if there was a unanimous verdict to convict, that the trial was not fairly considered because among seventy-one judges, all having independent minds, that if they had given careful consideration of the trial and impartially considered it, that there must have been some one in favor of the accused, and therefore the trial was declared illegal and set aside; but if there was a unanimous verdict for acquittal the verdict stood.

The procedure in a capital trial differed in many im-

portant respects from that adhered to in civil trials. The following is a striking contrast between capital trials and money trials, as noted by Bisek in his "Trial of Jesus Christ":

"Money trials and trials for life have the same rule of inquiry and investigation. But they differ in procedure in the following points: the former require only three, the latter three-and-twenty judges.

"In the former it matters not on which side the judges speak who give the first opinions; in the latter, those who are in favor of acquittal must speak first.

"In the former, a majority of one is always enough; in the latter, a majority of one is enough to acquit, but it requires a majority of two to condemn.

"In the former, a decision may be quashed on review, (for error), no matter which way it has gone; in the latter, a condemnation may be quashed, but not an acquittal.

"In the former disciples of the law present in the court may speak (as assessors) on either side; in the latter, they may speak in favor of the accused, but not against him.

"In the former, a judge who has indicated his opinion, no matter on which side, may change his mind; in the latter, he who has given his voice for acquittal may not change.

"The former (money trials) are commenced only in the daytime, but may be concluded after nightfall; the latter (capital trials) are commenced only in the daytime, and must also be concluded during the day.

"The former may be concluded by acquittal or condemnation on the day on which they have begun; the latter may be concluded on that day if there is a sentence of acquittal, but must be postponed to a second day if there is to be a condemnation. And for this reason capital trials are not held on the day before the Sabbath or a feast day."

In case of acquittal the prisoner was immediately released and the trial closed. In the event of conviction, sentence could not be pronounced until the next afternoon and the session of the court was accordingly adjourned until the following day. The second part of the trial was then begun.

It must be remembered that there were two trials of every Hebrew capital case. The second day of the hearing was not a new trial, but a proceeding in the nature of an appeal and was intended to accomplish a review of the proceedings of the previous day. Additional testimony, however, which had been discovered after the close of the first trial might be introduced. But the record of facts seems not to have been considered so important as the

question of the fixed opinions of the judges. Each member of the Sanhedrin was required on the second day to vote again and to declare anew his notions concerning the guilt or innocence of the accused. The statements of each judge were carefully noted by the scribes and compared with his statements of the previous day. If any judge voted for conviction at the second trial and founded his judgment on reasons and arguments radically different from those of the first day, his verdict was rejected. A member who had voted for acquittal on the first day was not permitted to change his vote for conviction on the second day; but one who voted for conviction at the first trial might by giving valid reasons, vote on the second day for acquittal.

When the balloting was complete the number for and against the accused was again announced. If a majority of at least two were registered against the accused he stood convicted a second time.

The death march and the final circumstances attending the execution of a Hebrew prisoner are without parallel in the jurisprudence of the world. As the prisoner was led away to his doom, a man carrying in his hand a flag, was stationed at the entrance of the Sanhedrin Hall. A mounted officer of the court followed the procession at a convenient distance and kept his eyes constantly turned in the direction of the flag bearer on the hill. A herald carrying aloft a staff from which fluttered a crimson banner, made proclamation to the gazing multitude along the way that a human being was about to be executed. He cried aloud: "This man is to be put to death on the testimony of witnesses so and so on such and such a charge. If any man knows anything favorable to the accused, in the name of God let him come forth and speak, in order that the prisoner may be led back to the Sanhedrin Hall, to be again confronted and tried by his judges."

If any witness, friend or stranger, came forth to furnish new evidence in favor of the condemned man, the procession was halted and the accused was led back to the Sanhedrin Chamber. If any member of the court still sitting in the hall of judgment thought of any new evidence in behalf of the accused that had not been offered at the trial, he arose quickly in his place and stated it to his fellow judges. The flag at the gate was then waved and the mounted messenger, chosen for such an emergency, saw it waving and galloped forward to stop the execution.

The prisoner himself could delay or prevent the accomplishment of the death penalty if he could give to the

Rabbi who escorted him any valid reason why he should not be put to death. He was led back as often as he gave a good excuse, not exceeding five times, the number prescribed by law. If no new witnesses appeared and the prisoner made no further plea for life, the procession proceeded to within a short distance of the place of execution. The prisoner was then exhorted to declare himself guilty of the crime of which he was charged and to make full confession of all his sins. He was then led to the ground of execution. He was given a mixture to render him unconscious of his impending doom and insensible to the agonies of death, and this mixture was prepared by the Hebrew women in tender and merciful regard for the wretched prisoner who was about to die. The prisoner was either stoned, strangled, burned or beheaded, according to the nature of the crime. Death by crucifixion was not practiced by the Hebrews. Soon after the execution the friends and relatives of the dead man made friendly calls upon the judges who had tried and sentenced him. The visits were intended to show that the visitors harbored no feelings of bitterness or revenge against those who, in condemning one of their loved ones to death, had only performed the high and righteous duties of just and honorable judges in Israel.

A verdict of acquittal could never be reversed, but a verdict for conviction could. Even the accused himself had a right to say: "I have some new evidence in my favor." Whereupon he was brought back. The first two times he was taken back by mere statements. After that he had to give some reason. In order to save time and futile impediments two court members accompanied him and listened to his arguments, and if they thought them worthy he was returned as many times as necessary. If a convicted person escaped from court and later brought back, no reversal followed.

Time of court sessions was from morning services until noon, but if necessary it could be continued in the afternoon, and even at night in civil cases, but never at night in criminal cases. However, no original jurisdictional proceedings of whatever nature could begin at night. Capital offenses could only be decided by daylight. Days on which court could not be held were on holidays and on the sabbath, and it was not held even on the eve of these days.

And from the various authorities reviewed I may succinctly state the High-Lights of the Great Sanhedrin, as follows:

No person could be convicted of a capital offense on less than the testimony of two witnesses to the same overt act. One witness was regarded as no witness. It required two or more whose testimony must agree and relate to one and the same offense.

No person could be compelled to be a witness against himself, and even his voluntary confession was not competent to convict him.

Circumstantial evidence was not admissable against the accused, and every presumption was indulged in favor of his innocence until the final verdict of guilty was pronounced.

The trial of a person charged with a capital offense had to be conducted in public, and no evidence could be produced in his absence.

The trial of a capital case could not be heard at nighttime, on the Sabbath or on a festal day, and could not be begun on the eve of such days and no sentences could be executed on such days.

Sentences upon a verdict of guilty could not be pronounced until the third day after the findings, and then only after a second vote returned the same as the first.

All witnesses for the prosecution were required to be admonished before giving their testimony, to remember the value of human life and to take care that they forget nothing that would be in the prisoner's favor.

All witnesses testifying against the accused were required, in case he was convicted of a capital offense, to take an active part in inflicting the death penalty, in order to add great certainty to their testimony.

The false witness was subjected to the same penalty he voted by the false testimony to impose upon the accused.

It was the axiom of this law that the function of the court was to save and not destroy human life.

The court could neither act as prosecutor nor accuser, but under the law was required to protect and defend the accused. As both judges and jurors it was their sole duty to determine the question of guilt or innocence according to the law and evidence.

At the conclusion of the evidence one of the judges made a brief summary thereof, whereupon all the spectators were removed from the court room and the judges proceeded to ballot.

If the majority of the court voted for acquittal, the accused was set at liberty; but if a majority voted for conviction no announcement of the findings could then be

made. At least one day must intervene between the vote of conviction and the pronouncement of the verdict of guilty and the sentence. During the interval the judges could not be occupied with any matter that would divert their minds from the case. After the morning sacrifice on the third day following the vote for conviction, the court must return to the judgment hall and proceed to take another vote. A judge who voted to condemn originally might now change his opinion and vote to acquit, but one who voted to acquit at the first hearing was not permitted to change his opinion and vote for conviction.

Under the law it was the duty of the court to defend the accused, and a verdict of guilty without some member of the court having interposed a defense was invalid.

A unanimous vote of guilty was considered as indicative of a conspiracy against the accused, that he had no friends or defenders and that the verdict was arrived at without material consideration. Under the law such verdict had the effect of an acquittal.

Any indignities inflicted upon the accused during the progress of the trial subjected those who permitted them to the same punishment as if they were inflicted upon one not accused.

The presumption of innocence attended the accused until the final vote of guilty was announced, and until then the court was bound to protect him from insult or injury.

As I stated in the very beginning of this article, the discussion would be limited to only one branch of Hebrew Jurisprudence; that is, the criminal procedure in the Great Sanhedrin Court, and it may be appropriate to here state that under the legal system of the Sanhedrin Courts, there were three kinds of tribunals for the administration of justice:

1. Petty courts composed of three judges, and competent to adjudicate upon civil causes only;
2. The provincial Sanhedrin, consisting of three-and-twenty judges, and having criminal jurisdiction to a limited extent, as well as the power of deciding all civil matters; and
3. The Great Sanhedrin of Jerusalem, which was of supreme authority of the nation, and functioned as an appellate court for all the lesser or lower Sanhedrin Courts, and also, as a trial court for large civil cases and those criminal causes in which the penalty was great, or as we say felony cases.

The rules of evidence in the civil causes were not so strict, as in the criminal cases of which I have detailed.

It has been my idea, object, and purpose in the presen-

tation of this subject to make an exposition of a jurisprudence, which had its existence in the remote past and comes to us as an ancient legal system, strictly from an historical point of view, as being of interest to every student of the law; giving the mode of procedure of that court formulated and established out of the ideas of religion, morality, and the standards of living among the ancient Hebrews long before the Christian Era. I have not attempted nor do I desire to either justify or condemn any particular trial, which took place before that court; but I merely desire to submit the simplicity of its organization, the rules of procedure, the mildness of its punishments, and the humanity throughout apparent, which may be left to speak for themselves.

This paper is the result of research gathered extensively from numerous sources, and I desire especially to give credit to those from whom I have quoted copiously and some times verbatim, as follows:

Civil and Criminal Procedure of Jewish Courts
By Rabbi Meyer Waxman.
In the 1914 Student's Annual Jewish Theological Seminary.

The Trial of Jesus
By Walter M. Chandler.

History of the Jews
By Heinrich Graetz.

The Story of Law
By John M. Zane.

The Jurisprudence of The Jewish Courts in Egypt
By Erwin R. Goodenough.

The Trial of Jesus Christ
By Andrew C. Bisek.

Martyrdom of Jesus
By Rabbi Isaac M. Wise.

The Trial of Jesus
By George W. Thompson.

Origin of Republican Form of Government
By Oscar S. Strauss.

The Jewish Encyclopedia.

Dr. William Ackerman, Rabbi, Temple Beth Israel, Meridian, Mississippi, who gave me much valuable information regarding this subject in my numerous conversations with him concerning the Sanhedrin Courts.
To all of whom I am very grateful.

THE SPRAGUE CASE

By H. H. Creekmore*

On December 16th, 1930, William Sprague, farmer and town clerk of Wantage, New Jersey, was, nationally speaking, unknown. Over night his name was broadcast over the entire nation, not on account of anything he had accomplished, but because an indictment returned by the Federal Grand Jury of the District Court of New Jersey was quashed on the ground that the adoption of the Eighteenth Amendment was invalid.

The publicity gained by farmer Sprague, whose labor shortly before that time had caused him to become thirsty, was insignificant with that accorded the jurist who handed down the astounding opinion, some fifteen thousand words in length, holding that the Eighteenth Amendment had not been validly ratified by the constitutional number of states. The Judge of the Court was Honorable William Clark, Harvard trained, thirty-nine years of age, and the youngest member of the Federal judiciary.

The case arose by an indictment presented by the Federal Grand Jury sitting in a District Court of New Jersey. In the indictment William H. Sprague and another were charged with violation of the National Prohibition Law, particularly Section 3 of title 2 of the National Prohibition Act, prohibiting the transportation and possession of intoxicating liquor. The defendants filed a motion to quash the indictment: the chief ground of the motion was the alleged invalidity of the Eighteenth Amendment by reason of the fact that it was ratified by the legislatures of various states and not by constitutional conventions of the respective states. Upon Judge Clark sustaining the defendants motion and quashing the indictment an appeal was immediately taken by the government to the Supreme Court of the United States, as by law permitted in such cases.

The exact holding of Judge Clark in quashing the indictment, sustained the motion of the defendants on the main ground relied on therein, that is; the Eighteenth Amendment is invalid because of its adoption by means of ratification of state legislatures instead of by constitutional conventions of the states.

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This holding of Judge Clark's caused widespread discussion, particularly in legal circles. It raised not only the question of the validity of the adoption of the Eighteenth Amendment, but necessarily it brought into mental review the status of all of the other Amendments and the extreme possibilities that might flow from an affirmance of the opinion of the District Judge in the Sprague case. Judge Clark began his opinion with this statement:

"The traditional method of adopting amendments to the United States Constitution is challenged. Upon the outcome of that challenge depends the disposition of the case at bar. Even if this opinion meets with a cold reception in the Appellate Courts, we hope that it will at least have the effect of focusing the country's thought upon the neglected method of considering constitutional amendments in conventions."

The learned District Judge is somewhat of a prophet for as later events show his opinion met a cold reception in the Supreme Court of the United States, but it did direct the attentive thought of the lawyers in America, upon the methods of ratifying constitutional amendments.

The decision in this case, to the non-legal mind, brought two entirely dissimilar reactions. One is typified by the statement attributed to the defendant Sprague when told of the decision; he said:

"Prohibition is a farce. I always knew the Eighteenth Amendment wasn't Constitutional. People should be able to drink what they want."

The other view was expressed by adherents of the Anti-Saloon League and other Drys who said Judge Clark was in rebellion against the Constitution and was trying to secure poltical favor from wet New Jersey and was ambitious to be Governor of that state.

To these declarations and accusations, Judge Clark replied that he would not consider any political office.

The Sprague case was but the culmination of an attack that has been continuously and consistently made on the Eighteenth Amendment and the methods of its adoption since it was first put into the constitution. Counsel for Sprague consisted of Frederic M. P. Pearse, of Newark, New Jersey; Selden Bacon, Daniel Cohalan, and Julius Cohen, all of New York City. These same attorneys have been since 1927 actively engaged in an effort to have the Eighteenth Amendment declared invalid on account of its ratification by state legislatures; and on this precise point Judge Clark's decision in the Sprague case rested.

To follow the argument on the question it may be helpful to set out here certain constitutional provisions.

Section 3 of the Eighteenth Amendment reads as follows:

"This Article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of the several states as provided in the constitution, within seven years from the date of the submission hereof to the States by the Congress."

The Eighteenth Amendment was submitted to the States by the Congress December 19th, 1917 and proclamation that it had been ratified by the legislatures of the necessary number of states was issued on January 29th, 1919.

Article 5 of the Constitution is as follows:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all intents and purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

Amendment Ten to the Constitution reads:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

From a casual reading of Article Five, it would seem clear that Congress in submitting the Eighteenth Amendment had chosen one of the two methods provided for the ratification of the proposed Amendment, and that the question was thereby foreclosed to further argument, but until the decision of the Supreme Court of the United States on the Sprague appeal, the proposition was not as simple as it might appear to the non-judicial mind. The proposition argued by the attorneys for Sprague was widely heralded as a new and different attack on the Eighteenth Amendment, but the fact is, it was not a new theory, for a number of articles by distinguished members of the bar, discussing practically this same theory and advancing the same argument have been published in different law periodicals for

a number of years: See. "Is there An Eighteenth Amendment." By White, in 5 Cornell Law Quarterly; McGovney. "Is the Eighteenth Amendment void because of its Contents." 20 Columbia Law Review 499; Abbott. "Inalienable Rights and the Eighteenth Amendment." 20 Columbia Law Review, 185.

Mr. Justin DuPratt White in his Article in Cornell Law Quarterly, above referred to, says:

"The soundness of three legal propositions must be apparent without any very deep readings of the constitution or prolonged reflection on the theory of our government, namely, first, that intra-state prohibition cannot be the subject of a valid constitutional amendment in the sense in which amendments are referred to in the constitution; second, that such prohibition cannot be grafted upon the constitution without the consent of the people of all the states; and third, **that such consent cannot be given by the legislatures of the states, but must come from conventions duly convened in accordance with a specific vote of a majority of the enfranchised citizens of the states respectively.**"

In this Article Mr. White in defense of his position contends for the old States Rights Doctrine more strongly perhaps than did any Southern statesman during the fifties.

But it is made manifest that the point on which the decision in the Sprague case turned was not a new one when we examine reports of decisions in cases arising some years ago. In fact before the Eighteenth Amendment had been ratified by a sufficient number of states to become effective, the Governor of Maine in conformity to a practice that prevails in that State, submitted to the Supreme Court of his State for their judicial determination the question, whether the joint resolution of the legislature of the State ratifying the Eighteenth Amendment must be referred to the people of the State for adoption or rejected by them. In answering this inquiry the Maine court held that the ratification of the proposed Amendment was complete, final and conclusive so far as Maine was concerned when the legislature passed the resolution. In its formal opinion reported in 107 Atlantic, 673, 5 A. L. R. 1412, the Court said:

"It admits of no doubt that in the matter of amendment which is covered by Article 5, the people divested themselves of all authority, and conveyed the power of proposal upon Congress or upon a national constitutional convention, and the power of ratification upon the state legislature, or upon state constitutional conventions."

The court further held that Congress in proposing con-

stitutional amendments did not act in the exercise of ordinary legislative power, but was acting in behalf of and as the representative of the people of the United States under the power expressly conferred by Article 5. The court also made mention of the fact that Congress in all other proposed amendments has prescribed for ratification, only the method of ratification by the legislatures, and that the legislatures in ratifying an amendment did not, strictly speaking, act in the discharge of its legislative duties as a law making body, but in behalf of and as representatives of the people as a ratifying body. And it was pointed out that the people through their constitution might have clothed other bodies with the power of ratification or might have reserved that power to themselves to be exercised by popular vote, but since they did not do so, they retained no power of ratification in themselves, but conferred it completely upon the legislature.

The same point was presented and argued in the so-called "National Prohibition Cases of 1920," but the court did not respond directly to that argument in its decision of the case although its conclusions of law as announced necessarily and impliedly decided the proposition adversely to its proponents.

To reach the conclusion and render the decision in the Sprague case invalidating the Eighteenth Amendment for the reasons stated in the opinion, required great research and considerable mental agility and certainly a large measure of courage and strength of character on the part of Judge Clark. I say this because; First, All nineteen Amendments have been ratified by action of state legislatures. Second, the Pocket Veto Case, *Okanogan etc. Indian Tribe vs. United States,* 279 United States, 655 (1928) reannounced a rule of public policy to the effect that great weight should be given to a long and established practice in determining the true construction of a constitutional provision. Third, the opinion of the Court in the "National Prohibition Case," states that the Eighteenth Amendment, "by lawful proposal and ratification has become a part of the constitution." Fourth, Article 5 in language so clear that he who runs (if not a lawyer) may read, says that proposed amendments shall become a part of the constitution, "when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof as one or the other mode of ratification may be proposed by the Congress." Fifth, it was necessary for Judge Clark to break away from the doctrine of stare decisis, and de-

termine the case from "a scientific approach to the problem of government," and then found it also necessary to modify the language of Article 5 quoted above, by reason of, "the principles of political science."

The Supreme Court in the Pocket Veto Case, supra, said:

> "The views which we have expressed as to the construction and effect of the constitutional provision here in question are confirmed by the practical construction that has been given to it by the Presidents through a long course of years, in which Congress acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character."

Other cases were quoted from, to the effect that a practice of at least twenty years duration on the part of the execution department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision, the phraseology of which is in any respect of doubtful meaning.

All nineteen Amendments to the Constitution have been ratified by the legislatures of the States, and the Eighteenth Amendment specifically provides that it shall go into effect only after being ratified by the legislatures of the several States within seven years from the date of its submission to the states by the Congress. Article 5 clearly confers on Congress the choice of two methods of ratification, one by the legislatures, the other by constitutional conventions. Sprague's attorneys argued before Judge Clark that Article 5 of the Constitution impliedly required that proposed amendments conferring on the United States new direct powers over individuals, should be ratified in conventions. The theory advanced was, that the legislatures were incompetent to surrender personal liberties of the people to the Federal Government; that the legislatures were usually occupied and busy with other matters and would not give due thought and deliberation to the proposed amendments; that a constitutional convention elected to determine one question only would be composed of a better class of representatives, and more likely to give mature and uninfluenced thought to the matter under discussion, and not be under the many handicaps and influences that members of the legislature were likely to be. But over and above this theory the argument was made that the Tenth Amendment is decisive of the question because that Amendment

reserved to the people power over their own personal liberty and actions, and the legislature cannot consent that such powers so reserved to the people be destroyed. Judge Clark refused to follow the reasoning of the attorneys along these lines, but attempted by a "scientific approach to the problem of government" to decide the question as one of "political science" and called to his assistance "political thought" of modern times. In his opinion he gives but scant consideration or weight to decided cases, but many writers on political science are referred to and quoted at great length; parts of speeches of senators and other statesmen and a message of President Andrew Johnson are incorporated in the opinion.

Judge Clark refers to and quotes from many others beginning with Confucius and ending with Claude Bowers and including Cicero, Lincoln, Abbott, Lowell, Taft, Bryce, James Monroe, and Benjamin Franklin.

The whole theory that the Eighteenth Amendment was improperly ratified goes back to the old idea often advanced that the framers of the constitution must have intended and did intend that the personal rights and liberty of the people should not be surrendered, or abrogated by action of the state legislatures.

In order that it may be seen how contrary to the decision of the Supreme Court of the United States in the National Prohibition case, was that of Judge Clark in the Sprague case, and to realize how truly the Sprague decision was merely a "tempest in a teapot" it is necessary to review briefly the facts surrounding and the arguments presented, and the decision of the court in the National Prohibition cases reported under the style of *Rhode Island vs. Palmer, Attorney General,* in 253 United States, 350; 64 Law Edition, 946.

These cases reached the Supreme Court by means of two original bills of equity brought by the States of Rhode Island and New Jersey, seeking to enjoin the execution of the Volstead Act; by four appeals from the various District Courts refusing to enjoin the enforcement of said Act; and by an appeal from the District Court for the Eastern District of Wisconsin enjoining the enforcement of the Act. The cases were decided June 7th, 1920, and the majority opinion written by Justice Van Devanter. There was a large number of distinguished lawyers who filed briefs in the cases, as amici curiae. Mr. Elihu Root filed a brief, together with numerous others as amici curiae and his

argument in so far as the questions under consideration are involved may be summarized as follows:

1. The ordinary and natural meaning of the terms used in Article 5, as well as the purpose to be accomplished, limit the authority granted by the Article to changes in the system of government, that is changes in the distribution and regulation of governmental powers.

2. That the power to amend does not include the power of independent legislation, and the word "amend" does not include an addition, or supplement, but must have some relation to the particular thing which is to be amended.

3. The Eighteenth Amendment directly deprived the several states of a substantial portion of their respective police powers and that being so, another amendment might sweep away every remaining vestige of the police powers of the state.

4. The Constitution depends for its true construction upon plain implications to be derived from its nature and terms, the historical circumstances surrounding its origin, and above all the fundamental purposes of its creation.

5. The Tenth Amendment reserves the right to a state to have whatever means or instrumentalities of local government it deems fit.

6. The word "legislature" used in Article 5 of the Constitution was employed in its broadest sense to denote the legislative instrumentality by which the legislative powers of a state might be expressed in the several states at any time during the future life of the nation. But how that department should be constituted, how it should act, when it should act, are all matters referred by the constitution to the states to settle according to their pleasure.

Messrs. Alexander Lincoln and Micheal J. Lynch filed a brief as amici curiae, and contended that (1) the Eighteenth Amendment is invalid because it was not ratified by the people or by constitutional conventions in the several states; (2) The states reserved to themselves the police power or power of local self government; and that power was intended by the framers of the constitution to be reserved to the states.

Numerous lawyers filed briefs but the arguments shown by the above cover the main points.

In deciding the case Judge Van DeVanter did not attempt to give his reasons for the conclusions announced by him, but only stated the ultimate conclusions of the court. Briefly he held as follows:

1. The prohibition of the manufacture, sale, etc., of in-

toxicating liquors for beverage purposes, is within the power to amend, reserved by Article 5 of the Constitution.

2. The Eighteenth Amendment by lawful proposal and ratification has become a part of the Constitution.

The question of which so much was made in the Sprague case, especially by the press and in the public mind, were presented in the argument of Messrs. Lincoln and Lynch in the National Prohibition Cases and were necessarily foreclosed by the conclusion of the court in that case that the Eighteenth Amendment by lawful proposal and ratification has become a part of the Constitution.

The Sprague case was decided by the Supreme Court of the United States February 24th, 1931 in an unanimous opinion announced by Mr. Justice Roberts, the youngest member of the court. From the opinion of Mr. Justice Roberts it will be observed curiously enough, that Judge Clark did not follow the argument advanced by Sprague's lawyers, but reached his conclusion, as stated before, by resorting to political science, and when the case was before the Supreme Court of the United States, Sprague's attorneys did not attempt to justify the reasons advanced by Judge Clark in his decision, but again urged upon the Supreme Court of the United States their original argument. So cold was the reception of Judge Clark's opinion by the Supreme Court that it said a mere reading of Article 5 demonstrated that it contained no ambiguity and calls for no resort to rules of construction. Mr. Justice Roberts pithily says in the opinion that the constitution was written to be understood by the voters. Inferentially he may have meant that it was not written to be understood nor expected to be clear to the trained in legal sophistry.

The opinion points out that the Supreme Court of the United States has repeatedly and consistently declared that the choice of mode of ratification rests solely in the discretion of Congress, that all amendments have been ratified by action of the legislatures and that the Thirteenth, Fourteenth, Fifteenth, Sixteenth, and Nineteenth amendments touch the rights of citizens. Thus the court has set at rest what might have been a great storm. It would be interesting to speculate on the effect of a decision upholding Judge Clark's opinion in the Sprague case. If the Eighteenth Amendment was not validly adopted, neither was the Thirteenth. If the Thirteenth was not validly adopted, slavery is still lawful. True, there might be some difficulty in securing the assistance of our wet brethren, or dry ones either, in certains parts of the country in reestablishing and put-

ting into practical effect the institution abolished by the Thirteenth Amendment, but still it would be legally and constitutionally in effect.

Then without the Fourteenth Amendment with its assurances of privileges, immunities, due process of law and equal protection of the law, what would become of our great business institutions operating in different states?

Verily the decision would have opened a "Pandora Box" of evil that would have made it necessary that there be a free and unlimited manufacture, sale and distribution of intoxicants as well as universal consumption thereof to make life tolerable in this country.

SECTION 147 OF THE CONSTITUTION OF 1890

By D. M. Russell*

In the November, 1930, issue of the Mississippi Law Journal Dr. A. B. Butts made a most valuable contribution to the bench and bar in his illuminating discussion of "The Court System of Mississippi."[1] He reviewed the history of the development of our judicial system through successive constitutional changes, and stated with clarity and concision the distribution of jurisdiction made among our courts by the Constitution of 1890.

In view, however, of the ever-recurring controversy as to the proper exercise of jurisdiction by our trial courts, I have wondered whether it would appear presumptious on my part at this time to undertake some extension of Dr. Butts' presentation insofar as it refers to section 147 of that Constitution.

By way of further apology for presuming to ask the bar and bench to indulge me to pursue this particular jurisdictional question farther, I may suggest that, in my judgment, the maintenance of our admirably adjusted jurisdictional boundaries as surveyed and established in 1890 is a matter of increasing concern to all of our people. I am willing to confess that my apparent solicitude may arise largely out of my experience as an unworthy member of the bench. But I think every member of the bench and bar will agree that there is rather convincing evidence furnished from time to time in court procedure, some of which is reflected in reported cases, that there is manifested some degree of indifference toward maintaining inviolate the integrity of our constitutional apportionment of the jurisdiction of causes. I venture to add that it will be agreed, furthermore, that this laxity arises for the most part out of an over use—or, to be more accurate, an abuse of the salutary saving clause, so to speak, expressed in said section 147, appearing in our State Constitution for the first time in 1890.

Fully informed as to the judicial systems provided for, and operated within, our commonwealth under the three preceding Constitutions, the eminent authors of our last and greatest Constitution were able to formulate a judicial

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1 Mississippi Law Journal, Volume III, p. 97.

scheme second to none anywhere, both in its definiteness in the distribution of jurisdiction, and in its flexibility as a safeguard against unreasonable rigidity in procedural observance.

Manifestly our Constitution makers realized that their most difficult undertaking with respect to the judiciary was the proper division of the judicial domain among the constituted tribunals; particularly the establishment and clearly marking of the boundary line between the jurisdiction assigned to the circuit court and that assigned to the chancery court. Under the three preceding Constitutions separate courts of law and equity had been provided for with varying jurisdictional limitations. During brief periods the so-called blended system of law and equity was administered by the same tribunals, and such a system had some support in the constitutional convention of 1890. The contest between the adherents of the blended system and the dual system is referred to in *Moore vs. General Motors,* 125 So. 411, where our Court, speaking through Justice Griffith, makes this observation:

"Supported by several able members, there was a strong minority sentiment in the Constitutional Convention in favor of the combining of the jurisdiction in law and equity into one court; and the most potent argument in favor of that proposal was the evil that often, after arduous and expensive litigation, a judgment or decree correct on the merits would be reversed solely on the point that the case had been instituted and prosecuted in the wrong court. The proposal mentioned had, however, no considerable support for the further proposition that the right of trial by jury should be extended to all cases, including those that were equity; and, strange to say, the argument mentioned overlooked its own weakness, in that the conferring of the combined jurisdiction on one court would not avoid the evil mentioned, for the question sought to be avoided would immediately rise again, as it has arisen in the case at bar, on the matter of the right to a trial by jury. But the Convention was well determined to preserve our separate court of chancery, and to meet the argument aforesaid and to cure the evil which was the chief basis of that argument, section 147 was devised and inserted in the Constitution."

In his masterful work, "Mississippi Constitutions," Justice Ethridge makes this comment on section 147:

"This section was intended to serve a very wholesome purpose. Prior to 1890 it frequently happened that a litigant got into the wrong court, and, regardless of whether the case was tried correctly, and the correct result reached, the judgment must be

reversed, and the case dismissed, making it necessary for the litigant to start anew, incurring all the costs and delay occasioned by such mistake. Sometimes the delay defeated the action, because the filing of suit in a court which had no jurisdiction did not stop the running of the statute of limitations. This section was placed in the constitution to relieve the litigant from a mistake of judgment by the courts as to which court the case should be tried in."

This was a contingency not provided for in preceding Constitutions. The result was that it frequently happened that after a long and expensive trial in the wrong court the Supreme Court on appeal would reverse and dismiss the case—all because the trial court, either mistakenly or arbitrarily, assumed jurisdiction denied it by the Constitution.

But this beneficent protection provided by section 147 was never designed to encourage or justify trial judges in flagrantly or indifferently disregarding constitutional provisions which definitely defined the jurisdiction of both circuit court and chancery court. It is hardly conceivable that the authors of section 147 ever contemplated that resort to the extraordinary relief which it provided would be necessary, or made, except in cases where, after the most earnest and thorough consideration of the jurisdictional question involved in a case, the trial judge might honestly entertain doubt as to the jurisdiction of his court to proceed, and which doubt such judge would erroneously resolve in favor of his jurisdiction. In other words, it was contemplated that only those causes which are in the twilight zone, and not clearly within the horizon of either circuit court or chancery court jurisdiction should make it necessary for the trial court to resort to section 147.

No circuit judge or chancellor is entitled to claim protection for the integrity of his judgment or decree under said section, unless and until he has done all within his power to make resort to the same unnecessary, by jealously guarding the door of his own court against jurisdictional invasion; and by transferring the invading causes to that tribunal to which the Constitution assigns them. If all the judges and chancellors who have presided over our trial courts during the last 40 years had deliberately and courageously maintained the jurisdictional boundaries marked out, repelling all invasions from either side, our jurisdictional fences would be in a better state of repair, and there would not be nearly so many annotations to section 147.

Beginning with the Cazeneuve case, 70 Miss. 521, our Supreme Court has consistently construed this section as

putting beyond its power the right of revision or reversal of any civil case where no error is assigned, or assignable, save the error of the trial court in assuming jurisdiction. As said in these cases, section 147 makes it possible for the circuit judges and chancellors to utterly strike down the line of demarcation which the Constitution has, by other related sections, definitely fixed between the jurisdiction of circuit courts and chancery courts; even including the denial to a litigant his constitutional right of a trial by a jury. In the recent case of *Talbott and Higgins Lumber Company vs. McLeod Lumber Company,* 113 So. 433, we are furnished a most interesting exposition of the operation of section 147, particularly interesting is the elaborate dissenting opinion of Justice Ethridge.

It thus appears that section 147 has left the Supreme Court impotent to protect the people in their constitutional rights to have their civil causes tried in courts upon which the Constitution has conferred jurisdiction, where the trial court has wrongfully assumed jurisdiction. But the Supreme Court has repeatedly expressed its disapproval of the action of trial courts in presuming to try causes belonging to the jurisdiction of another court. In *Wood Preserving Company vs. Meyer,* 76 Miss. 586, the Supreme Court admonished the chancery court that it should decline jurisdiction of an action at law. Many other similar admonitions appear in the Reports, either in express terms or inferentially.

In his valuable work, "Mississippi Chancery Practice," Judge Griffith, in commenting on section 147 and the related sections requiring judges and chancellors to transfer causes not within their respective jurisdictions, gives this analysis and admonition:

"But the constitution most emphatically had no such purpose as that the lines of distinction between law and equity should be broken down, obliterated or even confused. It merely devolved the obligation in the main upon the trial judges, rather than upon appellate judges, to see that this be not done; for, by associated sections it enjoined upon the circuit judges that 'all causes that may be brought in the circuit court whereof the chancery court has exclusive jurisdiction shall be transferred to the chancery court,' and upon the chancellors that 'all causes that may be brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court.' "

Under the heading "The duty of the trial judge to transfer," Judge Griffith has this to say in his section 515:

"Thus the means are freely provided for the transfer from one court to another, and it is repeated that the constitution enjoins

it upon the circuit judges and chancellors that they shall observe and thereby preserve the established jurisdictional lines, for they are nicely and wisely balanced in our state. The judges must not intrude upon them and must make the transfer from one court to the other when it is reasonably clear that a case has been brought in one whereof the other more properly has the jurisdiction, and moreover it is distinctly settled that the judge or chancellor not only may, but should, do this on his own motion. Often, it is true, parties come now into chancery with causes that are in strict view the subjects of law cognizance only and the parties preferring what may appear to them to be the more exact and dependable methods of the chancery forum make no point upon the jurisdiction in equity, and the chancellor not wishing to appear to shirk either responsibility or labor will sometimes hear such cases, but when he does so, it is inescapable that he does it in forgetfulness of his constitutional obligation and of his high duty to preserve unobscured the well-established lines between law and equity, and out of which we have so long and so greatly profited in clarity of principle and in preciseness of decision in the administration of justice in our state."

(It, therefore, conclusively appears that the judges and chancellors are the duly constituted guardians of our Constitutional dual court system.) They are definitely committed to its maintenance unimpaired. In fact, it may be said, generally, that the courts are the real, responsible custodians of the Constitution—all of it. They are its exponents, its defenders. Shall it be assaulted or maimed in the house of its friends—its guardians?

When the question of jurisdiction of a cause arises the court cannot be unmindful of the fact that the Constitutional objective inspiring the distribution of jurisdiction of causes among our trial courts was the conservation of the substantial rights of litigants. It is never a sufficient apology for wrongfully assuming jurisdiction to say, "substantial justice has been done." That usually means, in judicial parlance, that the result reached in a particular case was such as might reasonably be expected to follow a proceeding of the character involved in accordance with the procedure prescribed for the court that tried the case. The only Constitutional guaranty that equal justice should be meted to the rich and poor—all—alike must mean that justice which is ascertained in accordance with an orderly procedure provided for all alike.

It is no compliment to the intelligence or fidelity of any judge, when an attorney advances as his sole argument in opposition to a motion to transfer a civil cause to the appropriate tribunal, that the court is authorized by section

147 of the Constitution to take jurisdiction and that if it does, its judgment will be conclusive so far as jurisdiction is concerned. For let it be repeated that section 147 confers no jurisdiction on any trial court. Its sole purpose is to deprive the Supreme Court of the power to disturb the judgment of the trial court in a case where such court has wrongfully assumed jurisdiction and there was no other error.)

It necessarily follows that the trial court is enjoined to examine for itself the question of its jurisdiction under the Constitution to proceed in each cause presented; and if not satisfied that jurisdiction is conferred by the governing Constitutional sections, then transfer the cause to the proper tribunal; being careful to (assume jurisdiction of doubtful cases, under the protection of section 147, only when thorough investigation has pursued them to the twilight zone of "No Man's Land.")

LIABILITIES OF MUNICIPAL CORPORATIONS IN MISSISSIPPI

By Kenneth P. Vinsel*

It is generally recognized that in the organization of a government every grant of power should be balanced by a corresponding responsibility. Rights and privileges are generally linked up with obligations and duties. The linking up of the rights and privileges of a municipal corporation to obligations and duties presents a somewhat complex problem.

A national or state government is not amenable to suit by an ordinary citizen save only in so far as it has voluntarily agreed to submit to the jurisdiction of the courts. It often does this by means of statutes authorizing suits to be brought against it. The municipality is in no such position of immunity. Municipal corporations are usually subject to suit at any time by any aggrieved person. They can be compelled to appear in the courts to defend themselves and judgments may be entered against them. Not only is the municipal government responsible to the voters but the corporation may be cited before the ordinary courts with or without the consent of its governing authorities and be made a defendant in suits at law.[1]

Goodnow says, "While under the original constitutions the legislature would seem to have almost unlimited power over municipal corporations, on the ground that they are governmental bodies, in other branches of the law relative to municipal corporations we find a distinct acknowledgment of their private character resulting from the fact of their incorporation. It is now distinctly recognized that they may have private, legal liabilities, although as organs of government they are usually subjects of the public rather than of the private law."[2]

The city is liable to be sued in actions of contract or for the torts of its agents, or in causes arising out of its possession of property. It is not liable, however, for every

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1 Munro's *The Government of American Cities* (Fourth Edition), p. 120; Anderson's *American City Government*, pp. 124-125.

2 Goodnow's *Municipal Home Rule*, pp. 105-106.

misdeed or negligence, nor is its liability complete in all three classes of actions.

A suit that can be successfully prosecuted against an individual can be prosecuted against a municipal corporation in respect to the matter of contracts. In an action for breach of contract, the city can urge only the same pleas and defenses that are open to the individual defendant. It has no immunities on a breach of contract by reason of its being a public corporation.

In the matter of liability for torts, it must be kept in mind that the municipal corporation exercises both corporate and governmental powers. As a general rule there is no liability for negligence in the exercise of governmental powers. The liability depends upon the nature of the power exercised.[3]

In the general code charter for municipalities in Mississippi the first power given to cities, towns and villages is "to sue and be sued."[4]

CONTRACTS

A municipal corporation is usually held to have an implied power to make contracts that are reasonably necessary for the purpose of carrying out the objects of its existence. In Mississippi this power is expressly given. The statute authorizes all municipalities to make all contracts "in relation to the property and concerns of the municipality or administrative powers."[5] A municipal corporation is liable upon a contract which is within the scope of its chartered powers and has been duly made by the proper officials. In the matter of contracts, the municipality is subject to substantially the same rules as are applied to individuals or to private corporations.[6]

Judge Dillon points out some distinction between the acts of an officer or agent of a public corporation and those of an agent of a private corporation in respect to the liability on contracts. "Public officers or agents are held more strictly within their prescribed powers than are private general agents; and a contract made by a public agent within the apparent scope of his power does not, if there be no estoppel, bind his principle in the absence of actual au-

3 Munro's *The Government of American Cities* (Fourth Edition), pp. 120, 121; Elliott's *The Principles of the Law of Municipal Corporations* (Third Edition), Sec. 239.

4 *Code of 1930,* Sec. 2391, par. 1.

5 *Code of 1930,* Sec. 2391, par. 5.

6 Elliott's *The Principles of the Law of Municipal Corporations* (Third Edition), Sec. 246; Goodnow's *Municipal Home Rule,* p. 106.

thority.... In cases of public agents, the public corporation is not bound unless it manifestly appears that the agent is acting within the scope of his real and lawful authority or is held out by the authorized and proper officials or body of the municipality as having authority to do the act, or is employed in his capacity as a public agent to make the declaration or representation for the government.''[7]

CAPACITY AND POWER TO CONTRACT

Contracts made by a municipal corporation may be subject to the control of the legislature but the legislature, in exercising its control, must act within its constitutional limitations.[8] The statutes which grant powers to contract often contain limitations. Thus, a contract may require the approval of a majority of the electorate or a contract may be limited as to its duration.[9] Contracts outside the scope of the city's powers or those in violation of the law are void.[10] Citizens should not assume that municipal officers are in all cases acting within the line of their duty, but should make it their business to ascertain the exact nature and extent of municipal authority.[11] A municipality cannot surrender its governmental or legislative functions nor can it make contracts which will embarrass or control these functions. Neither may it contract away its contract powers.[12]

The contract power, in Mississippi municipalities, is exercised by the mayor and board of aldermen or the council.[13] A single officer of the municipality cannot contract for the municipality unless he is specially authorized to do so by law or by an order of the governing board. The mayor has no power to bind the corporation by written or oral contract or representation unless authorized to do so.[14]

When made by the rightful authorities, contracts may be binding upon a municipality for a reasonable number of years. Even where the express power was to make a contract year by year, the Mississippi court has held it reasonable and valid that a contract for water supply might extend

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7 Dillon's *Commentaries on the Law of Municipal Corporations* (Fifth Edition), Vol. 2, Sec. 775.

8 *State Board of Education v. Aberdeen,* 56 Miss. 518.

9 *Code of 1930,* Secs. 2401, 2415; *Heidleberg v. Batson,* 119 Miss. 510.

10 *Hirsch v. Vicksburg,* 141 Miss. 827.

11 *Edwards Hotel v. Jackson,* 96 Miss. 547.

12 *Edwards Hotel v. Jackson,* 96 Miss. 547; *Jackson v. Bowman,* 39 Miss. 671.

13 *Code of 1930,* Secs. 2392, 2639.

14 *Kidder v. McClanahan,* 126 Miss. 179.

for twenty years and that a contract for lighting the streets might extend for ten years.[15]

The constitution and the statutes declare that municipal contract in which officers or employees of the municipality have a personal, pecuniary interest are void.[16] The provision has been strictly construed by the courts.[17] In making contracts, the requirements of the statutes must be strictly observed by the contract making authorities.[18]

ULTRA VIRES CONTRACTS

Acts of a municipal corporation which are beyond the authority given to it by the state are said to be *ultra vires.* An *ultra vires* contract is one which is not within the power of a municipal corporation to make under any circumstance.[19] A distinction may be made between an *ultra vires* contract and an illegal contract. A contract may be *ultra vires* and yet not illegal. There can be no recovery upon a contract which is illegal in the sense of being absolutely prohibited by law.[20]

If a contract is *ultra vires* it is invalid and generally no recovery can be had if the municipality is sued on the contract. A municipality may sue to recover damages on an *ultra vires* contract providing it has been executed by the municipality and the other party has received benefits from the contract.[21] The invalidity of contracts because of *ultra vires* is more strictly maintained in favor of municipal than in favor of private corporations.

McQuillin says that if a municipality is sued on an *ultra vires* contract, "(1) no recovery can be had; (2) there can be no ratification except by the legislature; (3) the municipality cannot be estopped to deny the validity of the contract; and (4) there can be no recovery on an implied contract, although it has been executed and the municipality has received the benefit of the contract."[22]

A municipal corporation may ratify an *intra vires* contract, or one within the authority of the municipal corporation, when it is invalid and voidable because it was made by

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15 *Reid v. Trowbridge,* 78 Miss. 542; *Light Co. v. Jackson,* 73 Miss. 598.

16 Constitution of 1890, Sec. 109; *Code of 1930,* Sec. 2616.

17 *Noxubee County Hardware Co. v. Macon,* 90 Miss. 636.

18 *Leflore Co. v. Cannon,* 81 Miss. 334; *Reid v. Trowbridge,* 78 Miss. 542; *M. E. Church, South v. Vicksburg,* 50 Miss. 601.

19 McQuillin's *A Treatise on the Law of Municipal Corporations,* Vol. 3, Sec. 1172; *Noxubee Hardware Co. v. Macon,* 90 Miss. 636.

20 *Perkins v. State,* 130 Miss. 512.

21 *Perkins v. State,* 130 Miss. 512.

22 McQuillin's *A Treatise on the Law of Municipal Corporations,* Vol. 3, Sec. 1172.

an officer or committee not duly appointed or empowered to act, but it has no power to ratify an *ultra vires* contract.[24]

Municipal contracts in which officers or employees of the city have a personal pecuniary interest are void in Mississippi.[25] A contract by a city exempting a private corporation from paving its rightful share of a street has been held *ultra vires*. No municipality may contract away its legislative or administrative powers.[26]

Any other doctrine would be dangerous and would tend to subject the municipalities to abuse and ruin. As Dillon said, "The inhabitants are the corporators; the officers are but the public agents of the corporation. The duties and powers of the officers or public agents of the corporation are prescribed by statute or charter, which all persons not only may know, but are bound to know."[27]

In general, a municipality is not estopped from denying the validity of a contract made by its officers which is *ultra vires*. The rule has been felt to be harsh and modifications have often been made.[28] The Mississippi court has held, for example, that if a municipality gets money or other property pursuant to an *ultra vires* contract, it cannot plead *ultra vires* and still hold the property.[29] The general rule for estoppel is illustrated in a case where a municipality had selected a depository for public funds. The selection of the depository was made according to statute except the depository bond accepted by it was made by individuals as sureties rather than by a surety company as required by statute. The court held that the municipality was not estopped by the act of its officers in accepting such bond and the principal and sureties of the bond could not escape liability on that ground, provided the bank selected as the depository received the benefit of such bond by acting as the actual depository for the municipality.[30]

An entire contract is not necessarily invalid because a part of it is *ultra vires*. Irregularities in the exercise of power cannot be held as a defense against one who has in

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23 Constitution of 1890, Sec. 96; *Clark vs. Miller*, 142 Miss. 123.

24 *Jackson Electric Co. v. Adams*, 79 Miss. 408.

25 Constitution of 1890, Sec. 109; *Code of 1930*, Sec. 109; *Noxubee Hardware Co. v. Macon*, 90 Miss. 636.

26 *Edwards Hotel v. Jackson*, 96 Miss. 547.

27 Dillon's *Commentaries on the Law of Municipal Corporations* (Fifth Edition), Vol. 2, Sec. 791; *Edwards Hotel Co. v. Jackson*, 96 Miss. 547.

28 Elliott's *The Principles of the Law of Municipal Corporations*, Sec. 289; *Hitchcock v. Galveston*, 96 U. S. 351.

29 *Jackson Electric Co. v. Adams*, 79 Miss. 408.

30 *Perkins v. State*, 130 Miss. 512.

good faith parted with value for the benefit of the municipality.[31]

IMPLIED CONTRACTS

A municipal corporation, like a private corporation, may become liable on an implied contract within the scope of its corporate powers.[32] One of the most widely quoted statements on the subject of the doctrine of implied municipal liability is that of Chief Justice Stephen J. Field who held the doctrine ". . . applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake or without authority of law, it is her duty to refund it. . . . from the general obligation to do justice which binds all persons, whether natural or artificial . . . The law, which always intends justice, implies a promise. . . . As a general rule, a municipal corporation is only liable upon express contracts authorized by ordinance. The exceptions relate to liabilities from the use of money or other property which does not belong to her or to liabilities springing from duties imposed by the charter, from which injuries to parties are produced."[33]

A void contract by a Mississippi municipality for the acquisition of land to be used for a street was held by the court not to create an implied contract to pay for the use of the street. A contract was not implied from the benefits received under a contract which was *ultra vires*.[34]

CONSTRUCTION AND PERFORMANCE

The general rules governing the construction and operation of municipal contracts are the same as those governing contracts of private corporations or individuals. The municipality is only viewed as a body politic with respect to governmental powers granted by the state. Contracts entered into by the municipality in the exercise of its proprietary powers are construed as contracts between individuals. A somewhat different construction applies to contracts made by a municipality in matters affecting the

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31 *Hitchcock v. Galveston*, 96 U. S. 351; *Green v. Rienzi*, 87 Miss. 463; *Pontotoc v. Fulton*, 79 Miss. 511.

32 *Drainage District v. Sillers*, 129 Miss. 13.

33 Dillon's *Commentaries on the Law of Municipal Corporations* (Fifth Edition), Vol. 2, Secs. 793-795.

34 *Edwards House Co. v. Jackson*, 138 Miss. 644.

public interest. Public contracts will be liberally construed in favor of the public.[35]

A municipality must perform its valid contracts the same as an individual or private corporation, and even the legislature of the state has no power to authorize it to violate its contracts. A municipality is as much bound by its engagements as a private citizen. Municipal contracts may not be rescinded unless that right has been reserved.[36]

Contracts outside the scope of the municipal corporation's powers or those made in violation of the law are void and the municipality may not only be judicially restrained from entering into them but may be restrained from performing them if they are entered into.[37] Defective performance of a contract for public improvement has been held by the courts not to be a bar to special assessment in the absence of fraud.[38]

An occasional and immaterial breach which does not go to the substance of a contract will not act to rescind the contract. The city of Jackson brought suit for damages against a water company for a failure to supply water in certain quantities and at a specified force. The water company sought to rescind the contract because the city had not accepted the mains according to the exact terms of the contract. The breach was held by the court to be immaterial and not grounds for rescinding.[39]. The general law in respect to breach and rescission of contracts applies to municipal contracts.

TORTS

Private corporations are bound by the doctrine of *respondeat superior*. This is the doctrine that the employer is responsible for practically every act of his employee. As given by Dillon, the rule of law is that ". . . the superior or employer must answer civilly for the negligence or want of skill of his agent or servant in the course or line of his employment, by which another who is free from contributory fault is injured."[40] The municipal corporation is liable under this doctrine in the execution of its corporate powers and when its acts are within the scope of its powers.

35 McQuillin's *Treatise on the Law of Municipal Corporations*, Vol. 3, Sec. 1268.

36 McQuillin's *Treatise on the Law of Municipal Corporations*, Vol. 3, Secs. 1269-1271.

37 *Hirsch v. Vicksburg*, 141 Miss. 827.

38 *Jackson v. Buckley*, 123 Miss. 56.

39 *Light Co. v. Jackson*, 73 Miss. 598.

40 Dillon's *Commentaries on the Law of Municipal Corporations* (Fifth Edition), Vol. 4, Sec. 1647.

Following the idea that the state can do no wrong the doctrine is held not to apply to municipal corporations in the exercise of their governmental powers.

Acts which are wholly outside the power of municipalities result in no liability to the municipality. These *ultra vires* acts are of two kinds: (1) acts beyond the powers delegated to the corporations and (2) acts by a municipal officer which the corporation had the power to do but which the officer had no authority to do.[41] "It is accordingly well settled that when a municipal corporation undertakes a function not delegated to it by the legislature, it is not liable for negligence or misconduct in the performance of that function.... The principle, however, goes one step further and declares that if, in attempting to carry out one of its authorized functions, a municipal corporation exceeds its statutory authority, the corporation is not liable for any injuries that may result."[42] Small defects in the carrying out of the functions would not excuse the corporation. Opinion varies as to what are *ultra vires* acts and what are not.

Since the doctrine of *respondeat superior* applies to municipal corporations in the exercise of corporate functions and not in the exercise of governmental functions, the distinction must be drawn between the two classes of functions. This is a difficult task. Certain functions are clearly corporate, others are clearly governmental. Many functions in what is known as the twilight zone are held governmental in one state and corporate in another in respect to liability.[43]

The general rule of distinction in Mississippi has been expressed by the court as follows: "What are governmental powers and duties and what are corporate duties, is not subject to precise definition further than to say this: The powers and duties of municipal corporations are of twofold character; the one public as regards the state at large, insofar as they are its agent in government; the other private insofar as they provide the local necessities and conveniences for their citizens. A municipal corporation possesses two kinds of powers; one governmental and public, and to the extent they are held and exercised is clothed with sovereignty; the other private, and to the extent they are held and exercised is a legal individual. The former

41 *Warren v. Booneville,* 151 Miss. 457.

42 Ruling Case Law, Vol. 19, pp. 1137, 1138. See also *Chandler v. Bay St. Louis,* 57 Miss. 326.

43 Munro's *Government of American Cities* (Fourth Edition), p. 126; Anderson's *American City Government,* p. 126; *Byrnes v. Jackson,* 140 Miss. 656; *Bradley v. Jackson,* 153 Miss. 136.

are given and used for public purposes; the latter for private purposes.''[44]

A function undertaken by a municipality for the profit, benefit or advantage of the corporation or of the people who make up the corporation rather than for the public at large is considered as a private or corporate function.[45] Some courts have attempted to decide the question of an enterprise being corporate or not by determining if it is a profit-making enterprise.

A municipal corporation is not held liable for the failure to exercise its discretionary functions. This class of powers includes nearly all matters of improvement. The municipality may undertake a discretionary power or ignore it. It is a matter of legislative discretion and not subject to judicial supervision. After a contract for improvements has been made, the discretion is subject to the terms of the contract. After the improvement or work is completed, its proper maintenance and repair is imperative.[46]

Imperative or mandatory functions are those imposed upon the municipality. This leaves no option to the municipal corporation as to whether or not it may refuse the function. It must perform the duty under penalty of legal consequences. Usually ''shall'' or ''must'' are used to signify a mandatory duty but when the public is specially interested in the performance of an act the words ''hereby authorized'' or ''may'' have been construed to create a mandatory duty. The proper care of streets and alleys is held to be an imperative function.[47] The same is true with sewers and public utilities after they are established even though their original construction was purely discretionary.[48]

LIABILITY FOR THE EXERCISE OF GOVERNMENTAL POWERS

In the establishment and regulation of schools, hospitals, poorhouses, fire departments, police departments, jails, workhouses and police stations, Mississippi municipalities are clearly acting in their governmental capacity.[49]

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[44] *Hattiesburg v. Geigor*, 118 Miss. 676, 685.

[45] *Yazoo City v. Birchett*, 89 Miss. 700; *Semple v. Vicksburg*, 62 Miss. 63; Ruling Case Law, Vol. 19, p. 1109.

[46] *Bradley v. Jackson*, 153 Miss. 136. See dissenting opinion in same case, p. 167, quoting 28 Cyc., pp. 267-9.

[47] *Atkinson v. Decatur*, 131 Miss. 707; *McComb v. Hayman*, 124 Miss. 525; *Higginbottom v. Burnsville*, 113 Miss. 219; *Meridian v. Crook*, 109 Miss. 700; *Vicksburg v. Hennessy*, 54 Miss. 391.

[48] *Greenwood v. Pentecost*, 148 Miss. 60; *Williams v. Canton*, 138 Miss. 661; *Woods v. Indianola*, 114 Miss. 772; *Laurel Light Co. v. Jones*, 102 So. 1.

[49] *Bradley v. Jackson*, 153 Miss. 136.

The state owes the duty to all its citizens of protecting persons from assaults and property from destruction; those functions undertaken by a municipality in furtherance of this duty are governmental functions. These duties are exercised as a part of the state's sovereignty for the benefit of the public living within or without the corporate limits.[50]

Police: A police department is maintained as a governmental function. This function extends to police stations, jails and workhouses. The statutes allow Mississippi municipalities to work city prisoners on the streets. This is held as incidental to carrying out a jail sentence. In a case where a prisoner was forced to work on the streets by a street foreman, the municipality was held not liable although the prisoner was manacled and seriously injured as a result of being forced to work while manacled.

Nuisances: The power to abate nuisances is a legislative or governmental one and its exercise is at the discretion of the municipality. It is only when the city allows a nuisance to exist upon its own property or allows the continued existence of the nuisance, which is itself a breach of an imposed duty, that the municipality can be held liable for its failure to abate a nuisance. The town of D'Lo was held liable for maintaining a nuisance in building a hog pound within twelve feet of a residence and in leaving a dead pig in the pen for ninety-six hours after its death.[51] The city of Vicksburg has been held liable when it failed, after notice, to prevent private sewerage being emptied into gutters along the sides of its streets and flowing to a vacant lot, creating a nuisance.[52] The Mississippi courts are inclined to protect citizens against the existence of a nuisance. In the last mentioned case the court said, "If the city had regular sewerage, it could not, without liability, so debauch its contents and it cannot permit connection of private sewerage with its gutters to effect the same injury. A municipality cannot avoid its ministerial duty to prevent befoulment of its own gutters after notice of the nuisance so created."[53] The ministerial duty mentioned is that of the city in reasonably caring for its streets and gutters.

Fire Protection: Fire protection is uniformly held to be a governmental function.[54] Two Mississippi cases are illus-

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50 *Pass Christian v. Fernandez,* 100 Miss. 76.

50a *Warren v. Booneville,* 151 Miss. 457; *Code of 1930,* Sec. 2421.

51 *Crawford v. D'Lo,* 119 Miss. 28.

52 *Vicksburg v. Richardson,* 90 Miss. 1.

53 *Vicksburg v. Richardson,* 90 Miss. 1.

54 *Byrnes v. Jackson,* 140 Miss. 656; *Hattiesburg v. Geigor,* 118 Miss. 676; *Walker v. Vicksburg,* 71 Miss. 899; *Alexander v. Vicksburg,* 68 Miss. 654.

trative of this fact. A horse was struck and killed by a fire wagon. Even though the fire wagon driver was an employee of the city, and death of the horse was the direct result of this employee's negligence and the owner of the horse contributed no negligence, the city was held not liable.[55] In another case, the driver of a fire engine was injured by the negligence of the fire chief in maintaining a defective shed for the temporary storing of the fire engine. The court held strict non-liability in maintaining a fire department.[56]

The municipality is, of course, not liable for its failure to provide a fire department or for its failure to function swiftly and efficiently. Nor is a water company liable for the destruction of a house by fire because a designated pressure was not maintained.[57]

In the prevention of the destruction of property by fire or flood the city is not liable. Neither is it liable for the torts of officers and agents in their attempt to enforce ordinances and regulations under the police powers. In the exercise of the police powers the municipality acts in its governmental capacity.[58]

Supervision of Building Construction: In regard to regulating the manner of construction of buildings, the court has held the municipality to be acting in a governmental capacity. The city of Jackson straightened a stream in order to prevent damage to property by flood. The city bought the land through which the artificial drainage ditch was run; later selling the property but reserving in the deeds the right to direct and control the manner of erection of buildings beside and over the ditch. In supervising the construction of a building beside the stream, the city engineer insisted on supervising the details of mixing the concrete and the method of pouring it. Through his ignorance, neglect and lack of skill the contractors suffered great damage. In their suit for damages against the city the decision of the lower court that the city was acting in a governmental capacity was narrowly upheld by the Supreme Court. Three judges of the Supreme Court concurred in the dissenting contention that the city had no governmental right to go into the details of such construction. The dissenting opinion held that the city was here acting in a private capacity and said: "It appears to me to be a strange

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55 *Alexander v. Vicksburg,* 68 Miss. 654.
56 *Hattiesburg v. Geigor,* 118 Miss. 676.
57 *Wilkinson v. Water Co.,* 78 Miss. 389.
58 *Bradley v. Jackson,* 153 Miss. 136; *Gulfport v. Sheppard,* 116 Miss. 439; *Alexander v. Vicksburg,* 68 Miss. 564.

doctrine that a municipality, which is armed with certain powers, can go in and interfere with private rights and escape the consequences of its unlawful intermeddling and wrongs."[59]

LIABILITY FOR EXERCISE OF CORPORATE POWERS

The following explanation of municipal liability for corporate functions is based on the interpretation of the Supreme Court of Mississippi. The term corporate function is viewed from the standpoint of liability. Duties which are ministerial in their nature may relate to governmental affairs. Though it may be a governmental function to provide parks, garbage disposal, streets, sidewalks, bridges and sewers the liability in Mississippi of the municipality is of a corporate nature. In Mississippi the principle followed by the court is that the maintenance of these is a ministerial function and relates to corporate interest only.[59a]

Light Plants: A municipal corporation is liable for all negligence in the control of property held in a corporate capacity.[60] Municipalities, as well as private corporations, must exercise the highest degree of care in the erection and maintenance of electric light and power plants.[61] The fact that light wires had fallen into the street has been held to be prima facie evidence of negligence on the part of a light company whether privately owned or whether owned and operated by a municipality.[62] A city has been held liable for the death of a telephone repair man who was killed as the result of an electric light wire falling so that it charged a telephone wire.[63] In another illustrative case, the city of Greenwood permitted an electric light customer to run a ground wire in a public alley. The ground wire had not been inspected for a year and had been broken for about two months previous to an accident caused by its broken condition. The court held the city liable to the extent of six thousand dollars.[64]

Water Supply: Municipalities are also held strictly responsible for the torts of their agents and employees in supplying water or gas to the inhabitants of the corpora-

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59 *Bradley v. Jackson,* 153 Miss. 136.

59a McQuillin's *Treatise on the Law of Municipal Corporations,* Vol. 6, Secs. 2719-2721.

60 *Mackey v. Vicksburg,* 64 Miss. 777.

61 *Greenwood v. Pentecost,* 148 Miss. 60; *Williams v. Canton,* 138 Miss. 661; *Telegraph Co. v. Cosnahan,* 105 Miss. 615; *Laurel Light Co. v. Jones,* 102 So. 1; *Potera v. Brookhaven,* 95 Miss. 774; *Temple v. Light Co.,* 89 Miss. 1.

62 *Williams v. Canton,* 138 Miss. 661; *Potera v. Brookhaven,* 95 Miss. 774.

63 *Telegraph Co. v. Cosnahan,* 105 Miss. 615.

64 *Greenwood v. Pentecost,* 148 Miss. 60.

tion.[65] Not only is the municipality liable for the torts of its agents but it is also charged with the duty of supplying an adequate supply of water. The Mississippi court has held that a municipality owning the water system was liable for failure to remove an obstruction from a water connection within a reasonable time. The city was held liable for an insufficient flow of water.[66] The municipality is charged with the duty of reasonably maintaining the water supply once it has entered into the enterprise.[67] However, a water company is not held liable for the destruction of property by fire because of its failure to maintain a designated pressure.[68]

Garbage Disposal: The Mississippi court holds the hauling of dirt, trash or garbage as a ministerial duty. The city has, therefore, been held liable for the negligence of a driver of a city cart employed to this purpose. The duty is not a part of the state's sovereignty and is for the benefit of those living within the corporate limits.[69] In cases where the "scavenger" is an independent contractor, the city is not held liable for the negligence of the contractor. Where a scavenger, as an independent contractor, was trespassing by dumping garbage on a plaintiff's land the city was not held liable. The fact that the municipal authorities knew of the trespassing and had undertaken to stop it did not involve the city.[70] In another case, the cleaning of a cesspool was done by an independent contractor. The job was negligently done which resulted in injury to an individual but the city was not held liable even though the city inspector had approved the job. The inspection was held to be of a governmental nature and the negligence rested upon the independent contractor.[71]

Parks: The care and maintenance of parks is held to be a corporate function of Mississippi municipalities. The rule is established by a recent decision of the court regarding the maintenance of a zoo. A bear of the Jackson zoo had been taken from its cage and chained to a tree in the park. A woman was badly injured by the bear while attempting to feed it. Although the woman was partially negligent, the court held the city liable. Not only did the

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65 *Woods v. Indianola,* 114 Miss. 722.

66 *Jackson v. Anderson,* 97 Miss. 1; *Brown v. Meridian,* 102 Miss. 384.

67 *Van Norman v. Waterworks Co.,* 102 Miss. 736; *Brown v. Meridian,* 102 Miss. 384; *Jackson v. Anderson,* 97 Miss. 1.

68 *Wilkinson v. Water Co.,* 78 Miss. 389.

69 *Pass Christian v. Fernandez,* 100 Miss. 76.

70 *Laurel v. Ingram,* 148 Miss. 774.

71 *Gulfport v. Sheppard,* 116 Miss. 439.

court hold the maintenance of the zoo to be a corporate function but it went further by saying, "It seems to us that the rule making it the duty of the city to exercise reasonable care to make its parks reasonably safe places for people to resort to and making the city liable for negligence is the better rule."[72]

Streets: A Mississippi municipality, in maintaining and repairing streets is exercising a corporate function.[73] In a recent case the court said, "Our state is quite fully committed to the doctrine that a municipality, in exercising its statutory duty and prerogative of maintenance and repair of its streets, is exercising a corporate function."[74] The measure of the municipality's duty in the maintenance of its streets is to use ordinary care to keep them in a reasonably safe condition for persons using ordinary care and prudence.[75] The municipality is not held to be an insurer of the safety of its streets and it is not required to ensure the safety of reckless drivers.[76] A user may assume, however, that a street is reasonably safe.[77] Repairs must be made from time to time, particularly on those streets used most.[78]

In order for the municipality to be liable for injuries resulting from defects in its streets it must be negligent and have notice.[79] The burden of proof as to negligence of the municipality is on the person claiming damages.[80] The liability of a city is the same to children as to adults and the fact that a child was a trespasser does not excuse a city's negligence.[81] A defective condition in a street caused by a private person and permitted to exist by a city may be held as negligence. Where a twelve foot plank had been laid across a ditch by a private person and the city had taken no steps to remove it or make it safe, the city was held liable

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72 *Byrnes v. Jackson,* 140 Miss. 656, 670.

73 *Atkinson v. Decatur,* 131 Miss. 707; *Vicksburg v. Harralson,* 136 Miss. 872; *Higginbottom v. Burnsville,* 113 Miss. 219; *Saxon v. Houlka,* 107 Miss. 161; *Hardin v. Corinth,* 105 Miss. 99; *Pass Christian v. Fernandez,* 100 Miss. 76; *Pascagoula v. Kirkwood,* 86 Miss. 630; *Carver v. Jackson,* 82 Miss. 583; *Nesbitt v. Greenville,* 69 Miss. 22; *Vicksburg v. McLain,* 67 Miss. 4; *Whitfield v. Meridian,* 66 Miss. 570.

74 *Warren v. Booneville,* 151 Miss. 457, 461.

75 *Atkinson v. Decatur,* 131 Miss. 707; *McComb v. Hayman,* 124 Miss. 525; *Higginbottom v. Burnsville,* 113 Miss. 219; *Meridian v. Crook,* 109 Miss. 700; *Vicksburg v. Hennessy,* 54 Miss. 391; *Nesbitt v. Greenville,* 69 Miss. 22.

76 *Gulfport and Miss. Traction Co. v. Manuel,* 123 Miss. 266; *Higginbottom v. Burnsville,* 113 Miss. 219; *Walker v. Vicksburg,* 71 Miss. 899.

77 *Vicksburg v. Harralson,* 136 Miss. 872.

78 *Nesbitt v. Greenville,* 69 Miss. 22; *Whitfield v. Meridian,* 66 Miss. 570.

79 *Greenwood v. Harris,* 89 Miss. 121; *Saxon v. Houlka,* 107 Miss. 161; *Natchez v. Shields,* 74 Miss. 871.

80 *Meridian v. Crook,* 109 Miss. 700.

81 *McComb v. Hayman,* 124 Miss. 525; *Vicksburg v. McLain,* 67 Miss. 4.

for injury resulting from a person falling from the plank.[82] The city has been held not negligent where it permitted a brick or stone to extend about three inches above the level of the street although the projection caused an injury.[83]

A municipality is not held liable for injuries from a defect in its streets in the absence of actual or constructive notice.[84] The question of constructive notice attributable to the municipality is a question of fact. The jury may decide on the basis of the length of time the defect has existed, the nature and character of the defect, the publicity of the place where the defect exists, the amount of travel over the street and other facts which tend to show whether or not the corporate authorities should have known of the defect.[85] The existence of a defect for five or six years has been considered as constructive notice even though the street was seldom used.[86] Notice has also been presumed where the defect was in close proximity to the business establishments of the municipal officers and where they had driven over the street containing the defect.[87] In a case where the city had repaired a walk on Saturday before an accident occurred on Monday, the city was not held liable on the grounds of insufficient notice.[88]

Contributory negligence on the part of the injured party will excuse the municipality from liability where the corporation has exercised ordinary care in its maintenance of streets. The burden is usually on the injured to show affirmatively that he exercised at least ordinary care.[89] The question of injury from defective streets, of "proper and reasonable care" and of contributory negligence are questions for the jury.[90]

A municipality may be liable for obstructions in its streets whether placed there by itself or whether it permits some one else to place them there.[91] The Mississippi court has held a city liable for injury where barricades, erected while the street was being improved, interfered with travel to and

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82 *Jackson v. Clarke*, 152 Miss. 731.

83 *Pomes v. McComb*, 121 Miss. 425.

84 *Hattiesburg v. Reynolds*, 124 Miss. 352; *Jackson v. Carver*, 82 Miss. 583; *Nesbitt v. Greenville*, 69 Miss. 22; *Whitfield v. Meridian*, 66 Miss. 570.

85 *Greenville v. Middleton*, 124 Miss. 310.

86 *Whitfield v. Meridian*, 66 Miss. 570.

87 *Saxon v. Houlka*, 107 Miss. 161.

88 *Union v. Heflin*, 104 Miss. 669.

89 *Meridian v. McBeath*, 80 Miss. 485; *Stainbach v. Meridian*, 79 Miss. 447; *Walker v. Vicksburg*, 71 Miss. 899; *Vicksburg v. Hennessy*, 54 Miss. 391.

90 *Higginbottom v. Burnsville*, 113 Miss. 219; *Birdsong v. Mendenhall*, 97 Miss. 544.

91 *Nesbitt v. Greenville*, 69 Miss. 22; *N. O., J. & G. N. Ry. v. Maye*, 39 Miss. 374.

from a plaintiff's store.[92] A bumper placed at a street intersection by the authorities of Vicksburg was held to be a dangerous obstruction. The bumper was about five feet wide at the base and was placed at a street intersection to warn drivers of a dangerous intersection. Although a sign warned drivers of the bumper and the injured driver had some knowledge of its existence, the city was held liable.[93]

The municipality is not required to keep the entire width of its streets open and safe for travel providing that the part which is set aside is wide enough for safety and convenience.[94] The city of Gulfport allowed the erection of poles in the street but outside the traveled way. A death caused by a collision with one of these poles was held as the result of contributory negligence on the part of the driver.[95] Streets may be devoted to any proper purpose incidental to construction and maintenance of public thoroughfares. The municipality may be liable to abutting property owners for damages resulting from any additional servitude placed on the property by any such use not incidental or necessary to its use by the public.[96] A municipality may be held liable for damages inflicted on abutting property by the improper use of streets in providing drains.[97] A city may trim shade trees between the street and the sidewalk or even remove them without being liable, but if the action is not necessary the municipality will be liable.[98]

Under the constitution and the law the municipal corporation has no right to take or damage property for public use except upon just compensation.[99] The city must make such compensation when damages are inflicted by a change of a street grade.[100] Where the city is not negligent in changing a grade, no liability attaches to the city but damages are in the way of compensation for property.[101] Such

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92 *Funderburk v. Columbus,* 117 Miss. 173.

93 *Vicksburg v. Harralson,* 136 Miss. 872.

94 *McComb v. Hayman,* 124 Miss. 525; *Hazelhurst v. Shows,* 113 Miss. 263; *Butler v. Oxford,* 69 Miss. 618.

95 *Gulfport & Miss. Traction Co. v. Manuel,* 123 Miss. 266.

96 *Laurel v. Hearn,* 143 Miss. 201; *Hazelhurst v. Mayes,* 84 Miss. 7.

97 *Laurel v. Hearn,* 143 Miss. 201.

98 *Durant v. Castleberry,* 106 Miss. 699; *Brahan v. Meridian,* 97 Miss. 326; *Hazelhurst v. Mayes,* 84 Miss. 7.

99 Constitution of 1890, Sec. 17; *Code of 1930,* Sec. 2413.

100 *Oliver v. Macon,* 111 Miss. 349; *Brown v. Vicksburg,* 108 Miss. 510; *Murphy v. Meridian,* 103 Miss. 110; *Jackson v. Williams,* 92 Miss. 301; *Meridian v. Higgins,* 81 Miss. 376; *Vicksburg v. Herman,* 72 Miss. 211.

101 *Chidsey v. Pascagoula,* 102 Miss. 709.

compensation would possibly include the cost of raising a residence, surfacing a yard and laying a walk.[102]

When an abutting property owner by petition requests a city to grade a street to its proper lines and the city does so without objection from the owner, the owner is estopped from claiming damages.[103] However, where a property owner is required by a resolution of the municipality to make improvements and does so, the owner waives no right to damages.[104]

In making improvements the municipality must exercise care. In grading a street near a school a city left a cliff thirty or forty feet high. An eight year old child was killed by the caving in of a part of the bank. The Supreme Court upheld the trial judge's instruction that the city was liable even though it appeared that the bluff was left in a reasonably safe condition at the time of the grading.[105]

Although Mississippi municipalities are empowered to close and vacate streets,[106] when in its judgment it is for the public good, persons who have suffered special damages must have compensation.[107] The courts have jurisdiction to grant relief against improperly closing a street or alley as such an act is a judicial one and not a legislative one.[108] A land owner is not entitled to compensation for the closing of a street which did not abut his property.[109] The abutting owner must have a special easement in the use of the street being closed, otherwise he cannot complain of the act.[110]

Sidewalks and Bridges: The same rules of liability apply to the maintenance and repair of sidewalks and bridges as apply to streets. The municipality is required to exercise ordinary care.[111] In case of negligable defects of which the municipal authorities have notice resulting in injury, the

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102 *Murphy v. Meridian*, 103 Miss. 110; *Meridian v. Higgins*, 81 Miss. 376.

103 *Adams v. Vicksburg*, 124 Miss. 369; *Meridian v. Hudson*, 111 Miss. 339.

104 *Jackson v. Muckenfuss*, 101 Miss. 555.

105 *Vicksburg v. McLain*, 67 Miss. 4. See also *Jackson v. Merchants Bank*, 112 Miss. 537.

106 *Code of 1930*, Sec. 2412; *Poythress v. M. & O. Ry.*, 92 Miss. 638; *Ala. Ry. v. Turner*, 95 Miss. 594; *Laurel v. Rowel*, 84 Miss. 435.

107 *Berry v. Mendenhall*, 104 Miss. 94.

108 *Polk v. Hattiesburg*, 109 Miss. 872.

109 *Wesson v. Swinney*, 144 Miss. 867.

110 *Jackson v. Welch*, 136 Miss. 223.

111 *Meridian v. Peterson*, 132 Miss. 7; *Dahmer v. Meridian*, 111 Miss. 208; *Meridian v. Crook*, 109 Miss. 700; *Cohea v. Coffeeville*, 69 Miss. 561.

municipality is liable.[112] The burden of proof is on the plaintiff to show the city was negligent.[113] Contributory negligence usually excuses the city from liability.[114] In one Mississippi case a city was held liable notwithstanding some contributory negligence on the part of the plaintiff. In this case the city had permitted an unguarded hole to remain in a sidewalk for a long period of time.[115] The municipality may find itself liable for the maintenance and repair of a privately built bridge if the use of the bridge is sufficiently public. Bridges, whether over gutters or ditches, whether at street intersections, regular crossings or at other places, may be used by the public to such an extent that the municipality is liable for their proper maintenance and care.[116]

Sewers: Among the corporate capacities of Mississippi municipalities is the construction and maintenance of sewers. In an early case, the court held a city liable for damages caused by a city employee negligently closing the wrong inlet to a sewer. The court held that the action was purely mechanical, it was no governmental function and the city was liable for the tort of its employees in constructing sewers, gutters and drains.[117] A municipal corporation has been held negligent and liable where damage was caused by faulty and inadequate construction.[118] A municipality which compels connections with a sewerage system has been held liable to the owner of a farm upon which the system emptied, although the system did not belong to the municipality.[119]

The use of a ditch by a city for more than ten years to carry off drainage water results in a prescriptive right to maintain the ditch for the same character of service. The city, however, is liable if the character of service is changed by an increase in the flow of water or by an enlargement of the ditch.[120] A municipality has even been held liable for damages due to an insufficient sewer being substituted for one originally on the plaintiff's premises.[121]

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112 *Jordon v. Jackson,* 133 Miss. 440; *Natchez v. Lewis,* 90 Miss. 310; *Pascagoula v. Kirkwood,* 86 Miss. 630; *Hardin v. Corinth,* 105 Miss. 99; *Stainbach v. Meridian,* 79 Miss. 447; *McCauley v. Greenville,* 37 So. 818.

113 *Meridian v. Crook,* 109 Miss. 700.

114 *Jackson v. Greenville,* 72 Miss. 220; *Cohea v. Coffeeville,* 69 Miss. 561; *Meridian v. Hyde,* 11 So. 108.

115 *Jordon v. Jackson,* 133 Miss. 440.

116 *Meridian v. Peterson,* 132 Miss. 7.

117 *Semple v. Vicksburg,* 62 Miss. 63.

118 *Tyler v. Bay St. Louis,* 34 So. 215; *Fewell v. Meridian,* 90 Miss. 380.

119 *Thompson v. Winona,* 96 Miss. 591.

120 *Sturges v. Meridian,* 95 Miss. 35; *Watkins v. Port Gibson,* 113 Miss. 38.

121 *Fewell v. Meridian,* 90 Miss. 380.

ACTIONS AND PROCEEDINGS

In Mississippi it is not necessary that a claim be presented to the governing board of the municipal corporation before suit may be instituted.[122] Municipal corporations have no special rights not common to corporations in general in respect to actions. Municipalities may be sued in the courts to recover money, the same as other corporations.[123] Although municipalities are not subject to a suit by garnishment for debts arising from the exercise of its governmental functions, the immunity does not extend to the exercise of corporate functions.[124]

The courts have the power to make their judgments effective against a municipality. To quote the court: "When the debt is a binding obligation, a municipality, like any other creditor, must pay the debt if it has the property so to do, although some inconvenience may be suffered thereby."[125] A writ of mandamus may be used against a municipality to compel the payment of a judgment. Mandamus will not compel a municipality to raise its tax levy above the constitutional limitation but it may require a warrant to be issued and filed, giving it priority over other warrants to be paid out of the general funds.[126]

By a law passed in 1930, the municipalities are authorized to carry such employer's liability insurance as the municipal authorities may determine.[127] This is particularly advantageous to smaller municipalities.

CONCLUSIONS

The question of municipal liability is in an unsatisfactory condition. States vary in their attempts to draw the line between corporate and governmental functions. The Mississippi court has tended to classify more functions as corporate than have most other states.

Political scientists have often divided municipal functions into three classes: (1) those uniformly held as governmental; (2) those uniformly held as corporate; and (3) those which some states class as governmental and others class as corporate or which the same state will classify differently under different circumstances. This latter class

122 *Pylant v. Purvis,* 87 Miss. 433.

123 *State Board of Education v. West Point,* 50 Miss. 638; *State Board of Education v. Aberdeen,* 56 Miss. 518; *Vicksburg M. E. Church South v. Vicksburg,* 50 Miss. 601.

124 *Clarksdale Compress Co. v. Caldwell,* 80 Miss. 343, criticizing *Dollman v. Moore,* 70 Miss. 267.

125 *Jonestown v. Ganong,* 97 Miss. 67, 90.

126 *Jonestown v. Ganong,* 97 Miss. 67.

127 *Code of 1930,* Sec. 2443.

is commonly known as the "twilight zone." The tendency in Mississippi is to class the functions in the twilight zone as corporate.

The doctrine that "the state can do no wrong" is the basis of the interpretation that a municipality cannot be held liable for doing wrong so long as it exercises purely governmental functions. On the European continent the liability of municipalities is much broader than in the United States. The French communes are generally responsible for damages due to the torts of their agents, irrespective of whether the act took place in the administration of the city's property or services, or in view of the performance of a strictly governmental function. Failure to inspect the building of a bridge, or an injury received from the tort of a policeman may cause the French city to be liable. No such rule is prevalent in the United States even by those states holding a comparatively broad rule of liability.

Usually the only remedy for a party injured incidental to the exercise of a governmental function is an action against the officer who committed the injury. Such actions, even when successfully prosecuted, usually mean little in the way of receiving compensation for the damage suffered.

Complaints have frequently been made as to the injustice of the generally accepted rule of non-liability. Many believe that the individual bears too much of the burden of those injuries which are the result of inefficient administration. They hold that since the municipality functions in the interest of all, the damages inflicted by the city in carrying out these interests should be born by all. Where a fire engine speeding to a fire injures an innocent bystander on a sidewalk, the injured has no claim under the present doctrine. Yet the speeding of the fire engine is permitted in order to protect the community and to further its general interest, and if injury is done the community should bear the cost of the damage.

On the other hand, to hold the city liable for negligence in all cases would be unsound. It would be absurd to make the city liable for all fire losses, all losses from theft, and for damages due to mistakes in the administration of health measures. Every field of action or inaction might become a potential suit against the city. Higher taxes would possibly result in more injustice than under the present rule.

The present tendency seems to be toward broadening the range of corporate liability. In view of this fact it has been suggested that the city avoid "private or corporate" functions. The demand for the expansion of municipal activity

makes this practically impossible. Another suggestion has been to seek legislation declaring certain functions governmental. This would not avoid present complaint regarding non-liability although it would contribute some definiteness to the division of functions. A third suggestion has been to recognize the city's responsibility irrespective of the distinction between corporate and governmental functions. The question which arises under this third suggestion is whether there could be any way to protect the city against excessive litigation over unjust claims and from being subjected to exhorbitant awards.

The present tendency in the United States is along the line of a broad conception of municipal liability and in this tendency Mississippi is one of the leaders. The trend is in the direction of bringing about a minimum of hardship or in "socializing the load."

The fear that municipalities will be ruined by a broad conception of liability is groundless. Insurance may be used as a means of distributing the burden. The real means of meeting increased liability, however, is to provide greater care and efficiency in the administration of the city's work.

Bar Association Department

Pre-Convention Committee Reports

(Editor's Note: This department is added to the pre-convention issue to afford an opportunity for the examination and study of the various committee reports to the Mississippi State Bar Association with the idea that the Association may proceed to a disposition of the matters contained in the reports.)

COMMITTEE REPORT ON REORGANIZATION OF MISSISSIPPI STATE BAR ASSOCIATION

To the President and Members of the Mississippi State Bar Association:

The President of the Association in his annual address at the Biloxi meeting, April 30th and May 1st, 1930, suggested and urged the Association to consider a reorganization along some practical line in order that it might the more effectively perform the functions which the public has a right to expect and demand of it as an organization.

In response to the suggestion, Judge D. M. Russell made the following motion, which was unanimously adopted, "that a committee of five be appointed by the incoming President to study the question suggested and report back to the Association the result of their work at the next annual meeting."

Pursuant to this motion, President Butler appointed your committee, who submit, herewith, for consideration of the Association, the result of their study of the matter of a reorganization of the Association together with recommendations.

REPORT OF COMMITTEE

Historical

The Mississippi State Bar Association was organized, as now constituted, at Oxford, Mississippi in 1906. Hon. Garvin D. Shands was elected its first President. The Association was incorporated under Sec. 233 of the Code of 1906 in accordance with the provisions of Chap. 24 on corporations. Sec. 233 provides for such capital stock as the corporations may fix within legal limitations, but capital stock is not essential to its existence. All attorneys of the state of good moral character may become members of the corporation upon making application for that purpose and

upon compliance with the rules and regulations of the Association.

During the quarter of a century of its existence many distinguished lawyers of the state have served as presidents.

The membership of the organization as a whole, through the years, has been composed of a group of able and patriotic lawyers, men of learning and wide influence, who loved their profession and were willing to lend their influence and support in creating a bar of lofty ideals and a judiciary the equal of any other state in the Union.

The membership of the Association has been small, as compared with the entire bar of the state. Possibly not more than one-sixth of the entire state bar, until very recent years, were members, and even now, with the largest membership in the history of the Association, not more than one-fourth of the bar of the state are active members.

The organization has been able to accomplish good, and has wielded an influence on the whole bar and in the halls of legislation, despite the fact it has been but loosely knit together, and clothed with no statutory powers. But the present organization of our bar is inadequate to the needs of the profession from the standpoint of its individual interest and from the standpoint of service to the public. If it is to retain the esteem and confidence of the public, it must bring about, through a more efficient organization, those vital things necessary to inspire in the public mind a due and wholesome regard for the profession.

Types of Present Day Bar Organizations

At present there are three types of bar organizations in the United States. First, the type of which our own organization is an illustration. Second, an affiliated or federated bar organization, such as exists in Minnesota and Wisconsin. Third, the integrated or unified bar organization. The committee deems it unnecessary to discuss the first plan, and will devote its attention to the second, and more particularly, the third.

The Affiliated or Federated Plan

The primary purpose of the affiliated plan is to increase the membership of the State Bar Association and make it more representative. In order to accomplish this purpose, local bar associations are organized in the more populous centers. The local organization consisting of all the lawyers in that particular territory. Each local organization

then become affiliated with the State Bar organization and is represented in the State Bar organization by delegates. Each member of the local organization is required to pay annual dues, all of which goes to the State Bar Association, except what is absolutely necessary for the needs of the local organization.

In the few states where the plan exists a larger part of the bar is reached and brought into contact with the State Bar organization and its work. The influence of a representative part of the bar under this scheme is made available when the state organization desires to accomplish any project. This plan, in the states where it is in operation, has never fully met the needs and requirements of the bar, but is regarded as an improvement over the loose voluntary organizations found in this and other states. It may be stated, upon information in hand, that the affiliated or federated plan is not wholly satisfactory. This is evidenced by the fact that two of the states, Oregon and Washington, where the plan was adopted, have now turned to the unified bar plan, which they are endeavoring to have their legislatures enact into law.

The Integrated or Unified Bar Plan

The first suggestion of this plan in the United States came from the American Judicature Society in 1919 and was known as the American Judicature Society's Bar Organization Act. It was made the basis of discussion at the Conference of Bar Association Delegates held in Boston, September 2nd, 1919 and presided over by Hon. Elihu Root.

In 1920 the Conference of Bar Association Delegates of the American Bar Association put their stamp of approval upon what is known as the Conference of Bar Association Delegates Model Bar Act, which, with some modification, is to all intents and purposes the same as the American Judicature Society's Bar Organization Act. This Model Bar Act has the approval of the American Bar Association.

The first state to adopt legislation of this character was North Dakota, whose original acts were passed in 1921.

Then followed Alabama and Idaho in 1923 with legislative acts creating a pure integrated bar, these two states, in fact, creating the first outright integrated state bars in the United States.

In view of the tendency of the legal profession to cling to long established forms and to turn to something new but slowly and indifferently, it may be said a somewhat steady growth of the integrated bar plan has taken place. The

idea has taken root more rapidly in the great Northwestern states.

This possibly is attributable to the nearness of the Canadian Provinces where the integrated bar plan has always been the established order.

The following states at this date have adopted the integrated bar plan: North Dakota, Alabama, Idaho, California, Nevada, New Mexico, Oklahoma, South Dakota and Utah.

Bills have been prepared by the State Bar Associations and will be pressed at the next meeting of their respective legislatures in the states of Virginia, Montana, Kentucky, Ohio and Texas.

In the states of Michigan, Oregon, Washington and Missouri, Bar Association Committees have been appointed to do the same work now being done by this committee.

To summarize: nine states have adopted the plan by proper legislative acts, five bar associations have prepared bills and are ready to present them at the next session of their legislatures, and four bar associations, not including our own, have committees at work making a study of the plan. A total of nineteen states.

The most distinctive feature of the plan is an all-inclusive incorporated association. Every lawyer, of necessity, belongs to it and pays annual dues. All lawyers of the state who are engaged in active practice are active members. Those who are retired, or are engaged in other occupations, are classified as inactive.

Any lawyer on the active list failing to pay his annual dues, is automatically suspended from the privileges of practice until all arrears are discharged. The license fees, or dues, are paid into the state treasury as a separate fund and checked out by the commissioners.

The bar is governed by a Board of Commissioners of the State Bar. The number of commissioners constituting this board varies according to the idea or desire of the particular state bar. Alabama has a Board of Commissioners consisting of as many members as there are judicial circuits, who hold office for three years. These commissioners are selected by members of the State Bar who vote by ballot. In some of the states the commissioners are called governors.

On this Board of Commissioners or Governors, by legislative act of incorporation, is conferred certain authority or power. The power so conferred varies slightly in the several states that have adopted the integrated bar act, but substantially, all have followed the Model Bar Act suggested

by the Conference of Bar Association Delegates. For the purposes of this report attention is called to Sec. 6 of the Alabama Act, which provides: "The Board of Commissioners shall have power to determine by rules, the qualifications and requirements for admission to the practice of law, and to conduct through a Board of Examiners, hereinafter provided for, the examination of applicants, and they shall from time to time certify to the Supreme Court and to the Secretary of the Board of Commissioners the names of those applicants found to be qualified. . . . The Board shall, subject to the approval of the Supreme Court, formulate rules governing the conduct of all persons admitted to the practice and shall investigate and pass upon all complaints that may be made concerning the professional conduct of any person who has been or who hereafter may be admitted to the practice of the law, and subject to like approval, formulate rules governing the reinstatement of members of the bar who have been disbarred and pass upon all petitions for reinstatement. Said Board shall have power to appoint one or more committees to take evidence on behalf of the Board and forward the same to the Board. In all cases involving suspension, exclusion or disbarment, testimony in reference thereto shall be taken at the court house of the county of the residence of the party charged, provided the evidence of witnesses residing outside of said county may be taken in the same manner as provided by law for the taking of depositions, in civil cases. In all cases in which the evidence, in the opinion of the majority of the Board, justifies such a course, they shall take such disciplinary action by private or public reprimand, suspension from practice of the law, or exclusion and disbarment therefrom, as the case shall in their judgment warrant, provided that in case of exclusion and disbarment two-thirds of the Board shall vote affirmatively before exclusion and disbarment become effective, and provided further, that said Board shall not have jurisdiction over anything which may have occurred before the passage of this act. The Supreme Court may; and on petition of the party aggrieved must, in any case of suspension or bisbarment from the practice, review the action of the Board, and may, on its own motion, and without the certification of any record, inquire into the merits of the case and take any action agreeable to their judgment. Rules regulating the manner of such review and providing for the certification of evidence, or if the Supreme Court desire, the taking of additional evidence

shall be promulgated by said Board and become effective upon approval of the Supreme Court.

The Board of Commissioners shall also have power to make rules and by-laws not in conflict with any of the terms of this act concerning the selection and tenure of its officers and committees and their powers and duties, and generally for the control and regulation of the business of the Board and of the State Bar. . . ."

The California and Oklahoma Acts, Sec. 26, dealing with disbarment or suspension, provides, "upon the making of any decision resulting in disbarment or suspension from practice, said Board shall immediately file a certified copy of said decision, together with said transcript and findings with the clerk of the Supreme Court. Any person so disbarred, or suspended, may within sixty days after the filing of said certified copy of said decision petition said Supreme Court to review said decision, or to revise or modify the same, and upon such review the burden shall be upon the petitioner to show wherein such decision is erroneous or unlawful, etc."

Sec. 14 of the Alabama Act provides, "The Board of Commissioners shall establish rules governing procedure in cases involving alleged misconduct of the State Bar and may create committees for the purpose of investigating complaints and charges, which committees may be empowered to administer discipline in the same manner as the Board itself, but no order for the suspension or disbarment of a member shall be binding until approved by the Board."

Sec. 15. "The Rules and Regulations adopted by the Board relative to disbarment or admission to the bar shall not become effective until approved by the Supreme Court."

Sec. 16. Gives to the Board power to summon and examine witnesses under oath and compel attendance and compel the production of documents, etc.

Sec. 17. Deals with the rights of the accused, as to notice and opportunity to defend by introduction of evidence and examination of witnesses and to be represented by counsel.

In *Thompson vs. Board of Commissioners,* 216 Ala. 694, 112 So. 919, the Supreme Court of Alabama affirmed the order of the Commissioners, proceeding under the provisions of this act, disbarring the defendant.

Under the unified bar act in addition to disciplinary work, the bar is engaged, through its committees, in wide fields of activities. To illustrate, there is a group or committee engaged in what is known as the "Section Work."

This is a study of problems having to do with the improvement of the law and the administration of justice. The Board of Commissioners, or Governors, as they are called in California, report they have given much study and time to problems of this nature. The law schools in that state cooperate with the Board of Governors in doing research work of a nature which serves as an aid in working out a better administration of justice. Too great emphasis cannot be placed upon this feature of the integrated bar act. The Association is constantly at work in a constructive way for the improvement of substantive and precedural law.

Advantages of This Type of Bar Organization

The committee, in order not to burden the Association with too great detail, has enumerated below what appears to them, from their study of the subject, to be the definite advantages of the integrated or all-inclusive incorporated bar plan over the voluntary State Bar Association.

(1) The integrated incorporated bar has statutory powers commensurate with its responsibilities to the bar and public. The bar as a whole and every member of the bar is held responsible for the delinquencies of every other lawyer. A profession that harbors men whose honesty is not above question will never deserve nor receive the confidence of the public.

(2) Every lawyer who steals creates an impression on the lay mind that most lawyers are thieves. Every lawyer who is unethical in his conduct produces the impression in the mind of laymen that many lawyers are unethical. A bar that lacks the power to efficiently and effectively discipline unethical members in an expeditious manner is without power to protect the public and the great majority of honest lawyers from the unworthy members of the profession. The unified bar plan provides an effective and speedy plan of discipline. It provides for grades of punishment to be meted out according to the gravity of the offensive conduct. The punishment may consist of a private reprimand, a public reprimand, a suspension for a definite time, or disbarment for all time.

(3) It brings all lawyers into its membership and thereby greatly increases the number who participate in bar association activities, and at the same time makes every lawyer amenable to the ample statutory disciplinary power and influence of the association.

(4) It makes it possible to bring to bear the power and

force of a united bar upon any matter of interest to the public or profession.

(5) It is a definite, legally organized instrumentality, recognized by the courts, the legislature and the people, as an essential part in the machinery operated for the administration of justice.

(6) It makes the bar association work a continuous and not a spasmodic activity where important questions are passed upon without the possibility of proper deliberation. The entire bar become members of a corporation engaged in carrying out definite programs upon which is brought to bear the matured thought of the bar, and at the same time the association is not deprived of the enjoyment of the social phases of our annual meetings.

(7) It insures the necessary funds with which to finance the undertakings of the association and makes appeals to the legislature for financial assistance unnecessary.

(8) The machinery is present for bar examinations of those who desire to become members of the association and for those seeking admittance from other states. Leadership comes largely from the ranks of the lawyers. This leadership should continue, but it will not continue, unless the members of the bar are adequately trained, are unselfish and honest. Wise laws will not be enacted by men without proper preparation, unselfish laws will not be drafted by men seeking nothing higher than their own interests.

In short, an integrated bar plan has adequate machinery for dealing with such questions as professional ethics, discipline, unlawful practice of the law, educational requirements, distribution of information, public relations and research in problems of legislative and judicial reform.

Is Such An Integrated Bar Act Constitutional?

This question, among others, has been passed on by the Supreme Courts of Idaho, Nevada and California, and held to be constitutional without dissent. (For information of the Association particular points decided by the courts are set out below.)

In re Cate (Cal.) 279 Pac. 131.
In re Peterson (Cal.) 280 Pac. 124.
In re Henry, 46 Ida. 578, 269 Pac. 416.
In re Scott, 292 Pac. 291 (Sup. Ct. Nevada).
In re Richardson, 79 Cal. Dec. 477, 288 Pac. 669.
Barton vs. State Bar, 289 Pac. 818 (Cal.) (1930).
Carpenter vs. State, 81 Cal. Dec. 76 (1930).

The rules of the Supreme Court are rules of professional conduct.

Barton vs. State, 80 Cal. Dec. 45, 289 Pac. 818.

The State Bar Act is not unconstitutional as a local or special law.

State Bar vs. Superior Court, 207 Cal. 323, 278 Pac. 432.

In *re Edwards,* 45 Ida. 382, 228 Pac. 1068.

The State Bar Act is not unconstitutional as creating a corporation by Special Act.

State Bar vs. Superior Court, 207 Cal. 323, 278 Pac. 482.

The act is a regulatory measure under the police power.

McIntosh vs. State Bar, 81 Cal. Dec. 143 (1931).

The Supreme Court has exclusive jurisdiction to admit attorneys.

In *re Weyman,* 92 Cal. App. 646, 268 Pac. 971.

Sec. 26 of California Act, (Same as Sec. 6 of Alabama Act);

Sec. 26 does not provide for an unconstitutional distribution of governmental powers, nor does it vest judicial powers in the Board of Governors.

In *re Shattuck,* 208 Cal. 6, 279 Pac. 998.

In *re Peterson,* 207 Cal. 323, 278 Pac. 432.

State Bar vs. Superior Court, 207 Cal. 323, 278 Pac. 432.

SEC. 26 OF CALIFORNIA ACT.

Sec. 26 is not unconstitutional as denying due process of law, nor does a proceeding under the state bar act deprive anyone of property or right. Notice and a hearing are provided for and a hearing given in the court of last resort.

In *re Peterson,* 208 Cal. 42, 280 Pac. 124.

In *re Bruen,* 102 Wash. 472, 172 Pac. 1152.

In *re Peterson,* 280 Pac. 124 (Cal.)

SEC. 26 OF CALIFORNIA ACT.

The decision of the Board of Governors in proceedings before it are merely recommendatory in character, and only orders which have effect of working disbarment of a person are the final orders of the Supreme Court.

In *re Shattuck,* 208 Cal. 6, 279 Pac. 998.

In *re Peterson,* 280 Pac. 124 (Cal.).

Brydonjack vs. State Bar, 281 Pac. 1018 (Cal.).

The rules of professional conduct formulated by the Board of Governors of the State Bar by the approval of the Supreme Court, thereby become the rules of that court, and the power of the court to make reasonable rules and regulations is not an open question.

Barton vs. State Bar, 289 Pac. 818.
Brydonjack vs. State Bar, 281 Pac. 1018.

It Is Not An Experiment

The study of the subject leads the committee to think the practical workings of the integrated bar act has passed the experimental stage in the United States.

The committee has sought and obtained reliable information from lawyers of prominence in each state where the integrated bar act has been adopted. The practical working of the act and its efficiency and superiority over the voluntary association is unanimously asserted. The act has been in operation in North Dakota for ten years, Alabama and Idaho eight years, Nevada eight years, and California for six years. A sufficient length of time in which to test the efficiency of the act.

It should be kept in mind an integrated bar plan is not a new or modern scheme of bar organization. It has always existed in Canada, England and all the English speaking dependencies. It exists and has existed through the years in countries of Continental Europe.

The plan has the unqualified indorsement of the Conference of State Bar Delegates of the American Bar Association and such outstanding lawyers as Charles Evans Hughes, Elihu Root, John W. Davis, Chas. A. Boston, President of the American Bar Association, Hon. Henry Upton Sims, of Alabama, retiring President of the American Bar Association, and Hon. Herbert Harley, Secretary of the American Judicature Society.

Recommendation of Committee

From a study of the question and from the ideas of thoughtful and competent lawyers in the states where the integrated bar plan has been adopted, the committee is of the opinion the plan is safe, practical, and workable. We believe the plan presents decided superiority and advantages over any other plan of bar organization now in existence.

It may not be a panacea for all the evils common to the profession of the law, but it at least suggests and perfects a satisfactory way out of many of them.

We, therefore, recommend to the Association the appointment by the incoming President of a committee of five, one from each Supreme Court District, and two from the state at large, who shall be instructed to prepare the necessary legislative acts to put into operation an integrated

incorporated bar act in this state, making such changes in the plan as they think necessary to fit the phases of our state constitution.

This committee to make a report of its work to the 1932 meeting of the Association, together with any suggestions or recommendations the committee may think wise as to further procedure in order to make the proposed legislation effective.

Respectfully submitted,

T. C. Kimbrough, *Chairman,*
R. E. Wilbourne,
D. W. Houston,
J. N. Flowers,
W. H. Powell,
D. M. Russell.

REPORT OF COMMITTEE ON JURISPRUDENCE AND LAW REFORM

To the President and Members of the Mississippi State Bar Association:

We report with pleasure that the efficient Code Commission, heretofore appointed by the Governor under House Bill No. 16 of the 1928 session of the Mississippi Legislature, has completed its work.

The Bar of the State are indebted to the Commission and to the Legislature for this codification and annotation of the general statutes of the State, together with the annotation of the Constitution of the State and Amendments thereto.

The committee further calls attention to the majority and minority reports of the Special Committee to make a survey and study of the Courts of Justice of Mississippi, which appear in the Proceedings of the Twenty-Fifth Annual Meeting of this Association.

Your committee regards the establishment of a Judicial Council, or a Rule Making Commission, as of essential importance, and we commend these subjects to the further study and action of the Association.

Respectfully submitted,

T. Brady, Jr., *Chairman,*
W. W. Magruder,
Walter Sillers,
George W. Currie.

REPORT OF THE COMMITTEE ON JUDICIAL ADMINISTRATION AND REMEDIAL PROCEDURE

To the President and Members of the Mississippi State Bar Association:

The committee has no suggestions to offer for consideration by the Association. Such matters as might be discussed have been reported to and acted on by the Association in its prior meetings and this committee believes, therefore, that further action on those recommendations has been foreclosed.

Respectfully submitted,

A. H. Jones, *Chairman.*

REPORT OF LEGISLATIVE COMMITTEE

To the President and Members of the Mississippi State Bar Association:

The By-Laws provide that there shall be

7. "A committee to be composed of five members, of which the President shall be ex-officio member, whose duty it shall be to appear before the Legislature at each session thereof, at the expense of this Association, there to present and urge upon the Legislature the desirability of enacting into law such suggestions."

There were only two suggestions made at the last meeting of the Association:

1. "That a Judicial Council be established by the legislature for the continuous study of the problem of the promotion of justice in our courts." Although the 1930 Session of the Legislature was being held at that time, the session adjourned during the month of May and this committee was not appointed in time to take any action in regard to that recommendation.

2. "That the Legislature be asked to make an appropriation of Ten Thousand ($10,000.00) Dollars to be used under the direction of the President of this Association in the prosecution of disbarment cases." The President of the Association, Mr. Butler, without delay, had a bill introduced to carry out this recommendation. The bill was introduced in the House, favorably reported by the committee and

passed the House, but was indefinitely postponed in the Senate.

Respectfully submitted,
LEON F. HENDRICK, *Chairman,*
JAMES MCCLURE,
W. G. MCLAIN,
J. L. BYRD,
GEO. BUTLER, *ex-Officio Member.*

REPORT OF SPECIAL COMMITTEE ON PROPOSED JUDICIAL COUNCIL

To the President and Members of the Mississippi State Bar Association:

The Special Committee appointed by the President pursuant to a resolution adopted at the last session, to draft the necessary legislative bill to carry out the recommendations of a former committee in respect to the creation of a Judicial Council of fifteen members, with limited rule making power, respectfully reports as follows:

Except for the fact that the resolution aforesaid required that the committee should draft a short practice act which, if enacted, would stand as the basis of, and as fundamental to, all rules thereafter promulgated, the task assigned to this committee would not have been difficult and a full and final report could easily have been made to the present session. The inclusion, however, of the special feature just mentioned, has involved, as will be at once obvious, a wide and comprehensive study of a vast literature of the procedural law going back through a long course of years, and has demanded of the committee, if their suggestions were to be worth while, an application of time and thought to the subject far beyond the requirements of a committee in the ordinary course of work in this Association; and, such an undertaking requires that the general situation shall be such that the proper thought may be applied without the distraction of abnormal or depressed conditions among our people, to whom, in aid and sympathy, the first interest of members of the legal profession is always devoted.

The general adverse conditions which have prevailed throughout the state during the past twelve months, and which are still upon us, need not be more than mentioned. They are and have been well known to us all. It has not been practical, or even possible, to bring the minds of members to the subject assigned to this committee during

this period. And even if it had been, it is as certain as anything can be that rests in the future, that if this committee had now reported said proposed legislative draft in full, and it were adopted at this session of the Association, there would be no probable chance that it would or could receive consideration at the next, or 1932, session of the Legislature. That body at that session will be engrossed and encompassed by questions of State revenues and State finance, and general State management beyond those which have confronted a legislative session in many years, and there can be no reasonable hope that a subject such as we have here in hand could have a fair opportunity on the calendar of a legislative session beset with so many pressing problems of absolute necessity as will be before the next legislature at its first session.

In view of this general situation, the committee has thought it best, and in this we had the concurrence of the President of the Association, that the committee would not attempt to make a final report at this session of the Association; but that instead, the report should be made to the 1932 Annual meeting; that the report filed for that meeting should, after preliminary discussion, lie over for amendment or correction to the 1933 meeting, for final action; and if then adopted, the matter would be placed before the 1934 session of the Legislature. This plan would not only make the matter ready for the earliest legislative session at which there can be any reasonable hope that the proposal could receive thoughtful consideration in legislation, but would allow better opportunity to the Association, when normal times have been restored, to give upon the subject that more mature deliberation which its importance deserves.

Respectfully submitted,

V. A. Griffith, *Chairman.*

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NOTE: The names and addresses of all other officers, committeemen, and members of the Mississippi State Bar Association are contained in the August, 1930, issue of the Journal.

NOTE AND COMMENT

LIABILITY OF INSURER FOR AMOUNT IN EXCESS OF STIPULATED LIABILITY IN POLICY BY REASON OF THE FAILURE OF INSURER TO SETTLE THE CLAIM.—The question to be discussed in this note is whether or not an insurance company is under any duty to the insured under an indemnity policy to settle a case pending, or a judgment recovered against the insured if an offer within the indemnity limit is received, and whether or not the insurer is liable for failure to settle.

The Mississippi Supreme Court has answered the above question in the negative by the case of *Georgia Casualty Company vs. The Cotton Mills Products Company*, 132 So. 73. That question was before that Honorable Court for the first time and the court was confronted by decisions from other courts that cannot be reconciled. In the Georgia Casualty Co. case, the injured party had recovered a judgment against the insured in the sum of $12,500.00, which judgment was appealed as excessive. The injured party offered to settle the judgment of $12,500.00 for $9,000.00 and costs of court. The insured strongly urged acceptance of this settlement and proposed to contribute $500.00 toward the payment of said compromise. The insurance company, being of the opinion that the judgment was excessive and that said judgment would be reduced by the Supreme Court, decided to await the court's action. It was agreed that the attorneys who conducted the suit were diligent and skillful and that the litigation was properly conducted. The whole contention of the insured was that notwithstanding the maximum liability had been paid by the insurer, still the reservation by the insurer of the right to settle and the exclusion of the insured from that right, creates more than an option to settle, and imposes upon the insurer the duty to settle as a reasonably prudent man would settle.

By the terms of the contract the insurer contracts to indemnify the insured and to conduct his defense, reserving the right, but undertaking no duty to compromise. By the terms of the contract the insurer had the option to defend or settle the suit.

In the above case the insurer chose to defend.

There are two theories on which the action might be brought—in contract or upon tort. I shall attempt to discuss these two theories.

NON-LIABILITY ON CONTRACT

One of the strongest cases dealing with the contract theory of the case is, *Wisconsin Zinc Company vs. Fidelity Etc. Co. of Maryland*, 162 Wis. 39, 155 N. W. 1081, in which Barnes, J., delivered the opinion of the court. He remarked as follows: "There is no language in the policy that can fairly be construed to mean that defendant obligated himself to settle any and all claims that might be settled for $5,000.00 (the liability stipulated in policy) or less. No case is called to our attention where any such construction has been placed on similar contracts and we doubt if any can be found." And with regard to implied terms, his remarks are particularly pertinent: "The

reservation of the right to settle is a mere option, which, however, cannot be used for fraudulent purposes. We can find nothing in the contract by which the defendant agreed to make any settlement, nor whereby it agreed to exercise ordinary care in the matter of negotiating settlements. It would be an arbitrary assumption to say that the parties intended that their contract should contain such important provisions and still omitted any express mentioned of them."

The terms of the contract are plain and unambiguous. The insurer simply agrees to undertake the defense of the action and only reserves the right to make a settlement. The party could not contradict, vary, add to or subtract from the terms of the contract. By the contract the insurer simply agrees to defend the action and it may or may not compromise the case, but in all of this it is not to be liable beyond a certain definite limit. The insured agrees for this definite indemnity to give up his right to defend or to settle the case.

It was held in the case of *Best Building Company vs. Employer's Liability Corporation*, 247 N. Y. 451, 160 N. E. 911, that the contract of the parties must measure the liability of insurer in absence of fraud or bad faith; that there was no implied obligation in the policy that the company must or would settle according to any offer made. The insurance company had the option to settle but was under no legal obligation, either express or implied, to compromise or settle the claims prior to trial.

It was argued in the case of *Rumford Falls Paper Company vs. Casualty Company*, 92 Me. 574, 43 Atlantic 503, a case with fact similar to the Georgia Casualty case, supra, that by refusing to compromise within the limits of indemnity, the insurance Company assume the whole risk of further proceeding. This contention was rejected by the court which held that the policy of insurance was a contract of indemnity in which the parties had a legal right to insert any condition and stipulations which they deemed reasonable and necessary, providing no principle of public policy was contravened; that the contract should be construed according to the sense and meaning of the terms which the party used and the terms are to be taken and understood in their plain, ordinary and popular sense.

Other cases maintaining the view that recovery cannot be had in an action on the contract, where the contention is that there is a duty on insurance company to settle, are *Schmidt Etc. vs. Travelers Insurance Company*, 90 Atlantic 653; *New Orleans Etc. vs. Maryland Casualty Company*, 114 La. 153, 38 So. 89; *McAleenan vs. Mass. Bonding Company*, 219 N. Y. 563; *Levin vs. New England Casualty Company*, 233 N. Y. 631, 135 N. E. 948; *Auerbach vs. Maryland Casualty Co.*, 236 N. Y. 247, 140 N. E. 577, 28 A. L. R. 1294.

NON-LIABILITY IN TORT

The cases reviewed above acknowledge the liability for fraudulent conduct, or lack of good faith in refusing to settle but deny liability for negligent conduct. There are cases which do not deny the responsibility for negligent conduct. The cases maintaining both these views will be reviewed.

The liability of the insurance company caused by fraud and bad faith in not settling is based on a fraudulent intent. Law gives a remedy for damages caused by fraudulent representations whether the representations are connected with contract or not. The fraudulent intent is the basis of action. It appears

to the writer that there is ample grounds for imposing such liability on insurance companies where they in bad faith refuse a compromise. However, it does not appear that there is sufficient grounds for imposing liability on the insurers where they are guilty of negligent conduct.

Negligence is not an affirmative cause of action. Negligence is simply one of the ways that a legal duty may be violated. While intent is necessary for an action of deceit based on fraudulent representation, negligence is the absence of intent. "The very term "negligence" negatives the possibility of intention in negligence cases." Bohlen studies in the Law of Tort, page 6. This difference in nature and principle between fraud and negligence makes clear to the writer's mind the distinction the law draws between bad faith in refusing to settle and the bona fide exercise of a right to defend. There is no duty on the insurer to settle a case and therefore negligence could not be the basis of an action in tort. The only negligence on the part of the insurer that might be alleged is the failure to settle the suit within the limits of liability, and certainly no duty is imposed to settle. Where there is no bad faith shown but only a simple and honest mistake of judgment, there should be no recovery. It does not seem reasonable that a jury should decide when an insurance company has been negligent in refusing to settle. A great many times where there is clearly no liability an insurance company will settle the case rather than have a jury pass on the question of liability. This is a reasonable act on the part of the insurer. If the insurer is of the opinion that it has a chance with the jury and rather than pay a large sum in settlement of a case, which in the company's opinion is unreasonable, it decides to try the case, should the insurance company determine whether or not a reasonable person would settle? Should the insurer, in the exercise of its discretion, defend a case at its peril? The insurer is given the option to settle or defend by the stipulations in the policy and surely in the exercise of that right the insurer could not be said to be acting negligently, regardless of whether it chooses to settle or defend.

The insurance policy imposes all the duties that the insurer agrees to assume. There is nothing in the contract that imposes a duty on the insurer to settle any case, although it has the right to so do. The insurer performs its contract when it defends the case and pays the judgment recovered against the insured.

An obligation may be imposed by law upon the insurance company since it undertakes to serve the insured. Such an obligation was imposed in the case of *Douglas vs. U. S. Fidelity & Guaranty Company*, 81 N. H. 371, 127 Atl. 708, 37 A. L. R. 1477. That case was a tort action brought by Douglas against the Insurance Company for negligently failing to settle a claim for damages against insured. The court distinguished all the cases brought on the contract upon the theory that the duty to settle was absolute and maintained that in all dealings in the defense of claim, the insurer was bound to act as a reasonable man might act under the same circumstances. The court also criticized the holding in the Wisconsin Zinc Co. case, supra, which case held that the right to settle is a mere option, and that the insurer did not contract to use ordinary care in the matter of settlement. Quoting from the Zinc Company case, "It would be an arbitrary assumption to say that the parties intended that their contract should contain such important provisions and still omitted any express mentioned of them." The court in the Douglas case in criticizing the above theory, said: "So far as an obligation to use care is

concerned, the above reasoning has no weight. That obligation is ordinarly imposed by law upon all who undertake a service. *Burnham vs. Stillings,* 76 N. H. 122, 79 Atl. 987 and cases cited. It is not usual to express this duty in the contract.''

The Douglas case cites and re-affirms *Cavanaugh vs. General Accident Fire & Life Assurance Corporation,* 79 N. H. 186, 106 Atl. 604. That case held, (quoting from syllabus) that, ''one who insures another against liability for accident owes the insured the duty of settling with an injured person before suit, if that is the reasonable thing to do, and is liable to the insured for negligent failure to do so after assuming control of the claim.'' Such a decision is unreasonable in that it denies the insurance company the right to contest the case or if it does contest the cause, it does so at its peril. After a judgment has been rendered in excess of the stipulated liability, that decision would permit a jury to determine whether or not the insurance company was negligent in failing to settle. It would deprive the insurer of its right to settle or defend the case, a right stipulated in the contract of insurance.

In the case of *Stowers Furniture Company vs. American Indemnity Co.,* 15 S. W. (2d) 544, The Commissions of Appeals of Texas reversed the court of Civil Appeals stating that the better and sounder authorities and those in harmony with the spirit of the Laws of Texas support a contrary rule. The Commissions cites the Douglas case for approval and held that it would be a harsh rule if the Indemnity Company owed no duty whatever to the insured except that stated in the policy.

The case of *Mendota Electric Company vs. N. Y. Indemnity Co.,* 169 Minn. 377, 211 N. W. 317, holds that, ''good faith and fair dealings are correlative obligations and the insurer owes to the insured some duties in the matter of the settlement of claims covered by the policy.''

The case of *Wynnewood Lbr. Co. vs. Travelers Insurance Company,* 173 N. C. 269, 91 S. E. 946, holds that the insurer is not liable for not compromising the claim in the absence of any suggestion that insurer was negligent in the proper prosecution of the suit, or had acted in bad faith. Quoting from the opinion as follows: ''That provision (right to settle or defend) was evidently placed in the contract for the protection of the insurer, and gives the insurer the right to exercise its own judgment as to when a compromise and a settlement shall be made. Of course, it must be exercised in good faith and without any wrongful or fraudulent purpose. When properly exercised, it is binding upon the insured. It turns out that it would have been better for all parties, the plaintiff as well as the defendant, if the offer of compromise had been accepted, but, as is said in the brief of counsel for the defendant, ''this is a case where hindsight turns out to be better than foresight.'' It was a mistake of judgment, something not unusual in the affairs of this life. Such a mistake, honestly made, does not subject the person to legal liability.''

Another strong case holding that the insurer was under no duty to settle is, *Kingman vs. Maryland Casualty Co.,* 115 N. E. 348. The court said, ''It was appellants duty to elect to defend or to settle or to pay. It was not its duty to settle to the exclusion of the other alternatives. So the court held under similar policies, (citations follows). The institution of the suit created no other duty than to elect. By electing to defend, and by defending, appellee discharges full duty toward appellant arising at that stage of the proceedings.

As there was no duty to settle, the argument must fail. Liability against appellee cannot, in the absence of fraud, be predicated on the fact that it elected to defend, rather than to settle.''

The case of *Davidson vs. Maryland Casualty Co.*, 197 Mass. 167, 83 N. E. 407, states clearly the proposition that the insurer does not have to regard the interest of the insured to the prejudice of his own where there is a conflict between them as to carrying the case to a higher court on exceptions. The contract was fully performed when the case was defended.

CONCLUSION

As before stated the decisions of the courts are in conflict on this question. However, it is the opinion of the writer that the decision of the Supreme Court of Mississippi in the case of *Georgia Casualty Co. vs. Cotton Mills Products Co.* is supported by the better reasoning and weight of authority. The question as to the right of action upon the contract on the theory that the duty to compromise is absolute has been settled. There is no absolute duty to settle but an option, and when an election to defend or compromise has been determined, the contract is fully performed.

The better reasoned decisions, in the opinion of the writer, seem to support the view that no action for negligence can be predicated upon the insurers failure to settle a case. The insurer should not be liable for damages if he exercise his option and having made an election, performs a duty stipulated in the policy of insurance.

L. O. SMITH, JR.

RECENT IMPORTANT DECISIONS

Appeal and Error: Trial: Argument of Counsel; Latitude of.—The Journal is reviewing this case from a point of novel interest and as one extending the privileges of advocacy in the argument of the cause. The opinion written by Mr. Justice Etheridge in this case rightly deserves a place in the Classics of the Bench and Bar, if only for its rare literary value. The Journal is pleased to quote frequently from the opinion.

From the record it appears that the defendants in the court below, now appellants, had a contrivance in their place of business which held wrapping paper and which was fastened to a wrapping counter by means of screws and nails. At the wrapping counter the defendants had a wrapping clerk whose duty it was to wrap packages sold by the clerks in the store. The plaintiff, a saleswoman, was stooping near the wrapping counter when the wrapping clerk undertook to tear from the contrivance paper with which to wrap a package sold by the plaintiff. The roll of paper weighing some thirty-six pounds toppled and fell against the plaintiff, striking her head.

The plaintiff's evidence tended to show that the injury thus inflicted resulted in probably a permanent nerve injury. The defendants offered testimony to show that the plaintiff was before the injury inflicted with a horrible disease. From all of the conflicting and the maze of testimony, it was for the jury to determine whether or not the plaintiff's injury existed and to what extent it did exist. The jury found for the plaintiff.[1] The defendants appealed, assigning among other things, the arguments made by the attorneys for the plaintiff. (A special bill of exceptions thereto was not filed until after the trial had ended, but during the term.) It appears that one of the counsel for the plaintiff, in opening the argument, stated: "Not only have there been throughout the trial insinuations that the plaintiff was faking and trying to get money, but there have been insinuations against the character of the plaintiff throughout the whole trial." Whereupon the counsel for the defendants objected. The counsel for the plaintiff said in closing the arguments, "It is the rule of the sea in case of a sinking vessel, that women and children shall be first, but this defendant has . . . reflected upon the character of this wife and mother . . ." Whereupon objection was made and the court said: "Stay within the record, Mr.——." At the close of the argument the counsel for the defendant asked that the jury be instructed to disregard the last argument of counsel for the plaintiff. The court instructed the jury to so disregard the argument.

Upon this ruling of the trial judge and upon the several objections made to plaintiff's counsel's argument the Mississippi Supreme Court held, in affirming the judgment of the trial court, in *Nelms & Blum Company vs. Fink* (Miss.) 131 So. 817, speaking through Etheridge, P. J., "It is always a difficult matter, as well as a delicate one, to determine whether there has been an abuse of the privilege of advocacy in the argument of the cause. . . . The trial judge

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1 The Supreme Court held this to be negligence for which defendants were liable.

has a peculiar and distinct advantage of the judges of this court in judging upon such questions, because he is not only familiar with the evidence and the atmosphere of the case, as it may be called, but he has heard the entire argument and knows the setting that the language complained of has in connection with the argument on both sides of a case. . . .''

''Counsel necessarily has, and must have to serve his function and office, a wide field of discretion. He may comment upon any fact introduced in evidence.'' Unless it is palpably evident that there has been prejudice harmful to the cause injected or misstatement of the facts by counsel, the Supreme Court will not reverse. The court will not undertake to control the counsel's argument so long as he does not become abusive, or go outside the record as to fact or inject harmful prejudices.[2] To quote further from Mr. Justice Etheridge, ''Counsel is not required to be logical in argument; he is not required to draw sound conclusions, or to have a perfect argument measured by logical and rhetorical rules; his function is to draw conclusions and inferences from evidence on behalf of his clients in whatever way he deems proper, so long as he does not become abusive and go outside the confines of the record. Usually when the argument is considered as a whole it is found consistent and logical and frequently eloquent. Some of the greatest speeches in our history have been made within a courthouse. As has been said, the court cannot control the substance and phraseology of counsel's argument; there is nothing to authorize the court to interfere until there is either abuse, unjustified denunciation, or a statement of fact not shown in evidence.

''Counsel may draw upon literature, history, science, religion, and philosophy for material for his argument. He may navigate all rivers of modern literature or sail the seas of ancient learning; he may explore all the shores of thought and experience; he may, if he will, take the wings of the morning and fly not only to the uttermost parts of the sea but to the uttermost limits of space in search of illustrations, similes, and metaphors to adorn his argument.

''He may reach the uttermost heights of attainable eloquence, soar into the empyrean heights where his shadow may fall on the loftiest mountain top, as the eagle in its loftiest flight. He may borrow from every source, modern and ancient, such materials as he needs for his argument. He may clothe the common occurrences of life in the habiliments of poetry and give to airy nothings a habitation and a name. He may weave of words a rhetorical bouquet that enchants the ear and mesmerizes the mind. He may make the learning of the ages the servant of his tongue. His argument may be profound as logic and learning can make them. He may give wing to his wit and play to his imagination so long as he does not imagine fact not in evidence, which the court does not take judicial knowledge of, or does not go out of the record for the facts not in evidence. As to the facts in evidence, he may array them in such figures and forms and clothe them with such ideas and conclusions as he can conjure up in his mind for the best interest of his cause. He cannot, however, state facts which are not in evidence, and which the court does not judicially know, in aid of his evidence. Neither can he appeal to the prejudices of men by injecting prejudices not contained in some source of the evidence.''

WARNER BEARD, JR.

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2 See also *Gray vs. The State*, 90 Miss. 235 (Cited).

PARDON—FULL PARDON ABSOLVES AN ATTORNEY AT LAW FROM ALL THE CONSEQUENCES OF AN ORDER OF DISBARMENT MADE UNDER SECTION 3695 CODE OF 1930 AS A PART OF THE PUNISHMENT FOR THE COMMISSION OF A CRIME.—In December 1928 Charles W. Crisler was convicted in the Circuit Court of Hinds County of the crime of embezzlement and sentenced to a term in the penitentiary. He was then a duly licensed and practicing attorney at law, and the judgment included an order forever disbarring him from the practice of law in the State of Mississippi. After serving a portion of his term in the penitentiary, he was granted a full pardon by the Governor. Some time after receiving this pardon he filed a petition in the Circuit Court of Hinds County, setting up his conviction and pardon, and praying that the order disbarring him from the practice of law be annulled. The court declined to grant the prayer of the petition and dismissed it. On appeal the judgment was reversed and a judgment in accordance with the prayer of the petition was rendered. The reversal was based on the ground that the disbarment was made in accordance with Section 3695 of the Code of 1930 which provided, "Every person who has been or shall hereafter be convicted of felony, manslaughter excepted, shall be incapable of obtaining a license to practice law; or, if already licensed, the court in which he shall have been convicted shall enter an order disbarring such convict," and was therefore, a part of the punishment imposed for the commission of the crime of which Crisler was convicted. (Ex Parte Crisler—132 So. 103.)

While there is much conflict among the decisions passing upon the effect of a pardon on the right to disbar an attorney for criminal misconduct, the lack of harmony is probably more apparent than real, and arises from the differences in the nature of the charges on which the proceedings to disbar are based. Had the proceedings been under Section 3703, Code of 1930, which provided, "If any attorney or counselor at law be in default or record, or otherwise guilty of any deceit, malpractice or misbehavior, or shall willfully violate his duties, he shall be stricken from the roll and disbarred, and his license revoked by any court in which he may practice; and such persons shall never afterward be permitted to act as an attorney or counselor in any court in this state," a different result in Ex Parte Crisler might have been reached.

The effect of a pardon is, "A full pardon absolves the party from all legal consequences of his crime and his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided." (Bishop's Criminal Law, Section 916, eighth edition.)

This statement of the effect of a pardon is in accordance with the authorities. In *Jones vs. Board of Registrars* (56 Miss. 766, 31 Am. Report 585), a convict who had been pardoned was denied the right to register as a voter, and in reversing the judgment of the lower court, the Mississippi Supreme Court in a decision rendered by Judge Campbell, said that, "The doctrine of the authorities is that 'a pardon reaches both the punishment prescribed for the offence, and the guilt of the offender,' and that 'it releases the punishment and blots out of existence the guilt, so that in the eye of the law, the offender is as innocent as if he had never committed the offence. If granted after conviction, it removes the penalties and disabilities, and restores him (the convict) to all his civil rights; it makes him, as it were a new man, and gives him a new credit and capacity.' Ex Parte Garland, (4 Wall 333; 18 U. S.

L. ed. 366). A pardon by the Governor is an act of soverign grace, proceeding from the same source which makes conviction of crime a ground of exclusion from suffrage. The act of absolution is of as high derivation and character as the act of prescription. The pardon must be held to rehabiliate the person in all his rights as a citizen, and to deny to any officer of the State the right to impute to him the fact of his conviction after the pardon, he is as if he was never convicted. It shall never be said of him that he was convicted. The pardon obliterates the fact of conviction, and makes it as if it never was.''

In the light of this decision, the citation of other authorities is unnecessary, but it may not be amiss to state that the rule there applied to the effect of a pardon on the right of suffrage forfeited because of the commission of the crime for which the pardon was granted has been applied by other courts to the effect of a pardon on the disbarment of an attorney at law as part of the punishment for the commission of the crime for which the pardon was granted. *Ex Parte Garland,* (4 Wall 333, 18 L. ed. 366) *Scott vs. State,* (6 Tex. Civ. App. 343, 25 S. W. 337); In *Re Emmons,* (29 Cal. App. 121).

CARROLL KEMP.

Constitutional Law. Due Process Requires Notice and Hearing Before Court Can Deprive Parent of Child's Custody.—H. B. Sinquefield filed a petition in County Court for the custody of his two children, aged four and five years, alleging that their grandparents, Mr. and Mrs. W. P. Valentine, were unlawfully retaining control over them, continuing to refuse to deliver them to appellant in spite of his repeated demand on the Valentines so to do. On hearing it appeared that some six months before the presentation of the above mentioned petition, Valentine presented a petition to the chancellor of the district in vacation in which it was alleged that said Sinquefield was an unsuitable person to have custody and control over his children. The chancellor granted the relief prayed for without any notice having been given to appellant of the petition or without his being heard as to his ability to care for the child. The statute providing for the appointment of a guardian to take charge of a child in preference to the child's father, states that the parent must be ''unsuitable to discharge the duties of guardianship''; but nothing is said concerning notice or service of summons to the opposing party in the proceeding. (Code 1930, Sec. 1863.) HELD: Due process demanded that notice and hearing be had before a valid decree depriving the parent of his child could be rendered; and the decree having been rendered without notice and hearing, it could not be used in bar subsequently to a petition by Sinquefield for the custody of his children. (*Sinquefield vs. Valentine et al.,* 132 So. 81.)

In the case at hand, the court announces three constitutional principles on which it based its decision, which are in substance as follows:

1. ''Due process'' in the constitutional sense demands notice and hearing.

2. The guaranties of ''liberty'', found in the 14th Amendment to the Constitution of the United States, comprehend the privilege of a parent to have the custody and control over his own child, the creation of his life's blood,

his natural ward, as long as from a social aspect that parent is considered a person suitable to be a guardian for his child.

3. This being true, it is unconstitutional for any court to deprive a parent of his child without having served notice on him or her of the proceeding and affording an opportunity to be heard.

With regard to the Fourteenth Amendment to the Federal Constitution, the Court considered the case of *Meyer vs. Nebraska,* 262 U. S. 390, in which the court held that "the liberty guaranteed by the Fourteenth Amendment denotes not merely freedom from bodily restraint, but also the right of the individual to contract, engage in any of the common occupations of life, and to acquire useful knowledge, to establish a home, to bring up his children, to worship God according to the dictates of his conscience, and to enjoy those privileges long recognized at common law as essential to man's happiness."

What is meant by "due process" has been a mooted question from the beginning. No authority has ever so much as attempted to formulate any straight-lace rule as to what constitutes "due process" as applied in all instances. Undoubtedly such would be impossible as well as impractical and dangerous. But however indefinite the clause of the constitution may appear, it positively demands that courts cannot proceed without notice and hearing. Truly notice and hearing lie at the very foundation of our present judicial system, having been born in common law simultaneously with the idea of furthering justice and equity through court decisions. Fairness and impartiality, opinions devoid of prejudice, are indispensible to our tribunals as established. To further these principles and promote the general welfare, it is made imperative by the spirit of our Federal Constitution that courts hear both sides of every controversy where life, liberty, or property are at stake.

DAVID COTTRELL, JR.

STATUTE OF FRAUDS—WRITINGS CONNECTED BY INTERNAL REFERENCE; GUARANTY—DISTINGUISHED FROM INDEMNITY; BANKS AND BANKING—LIABILITY OF DIRECTORS FOR DEBTS OF BANK.—Suit in equity by the liquidators, against the directors, of the Crystal Springs Bank on a contract between the directors and the bank. The directors were bound by the contract to make good paper losses of the bank up to $273,000.00, on or after November 1, 1927. The bank agreed to carry this paper until that date, and then to assign that part of it on which the losses appeared to the directors, in consideration that the latter pay the losses. The paper was listed on a separate sheet, not signed by the directors, and referred to in the contract as "Schedule No. 1." The State Banking Department, approving the contract, refrained from assessing the stockholders to make good the losses. The bill was demurred to, which was sustained below. Reversed. *Love, Superintendent of Banks, et al. vs. Dampeer et al.,* (Miss.) 132 So. 439.

HELD: The contract was one of guaranty, not of indemnity. The paper on which the losses occurred was to be transferred to the directors if it became necessary for them to make good the losses. The bank was, therefore, under no duty to exhaust the remedies against the makers of the debts.

The consideration was adequate: the defendants were stockholders, officers, and directors of the bank; the banking department was about to call for

additional security, and was threatening to assess the stockholders; the bank might have been closed, and the directors sued for negligent management of the bank.

The contract was not a violation of the statute of frauds because of the fact that Schedule No. 1 was not signed by the defendants. The reference to it in the contract was sufficient to authorize the admission of parole proof as to its authenticity. *Wilkinson vs. Taylor Mfg. Co.*, 67 Miss. 231; *Waul vs. Kirkman*, 27 Miss. 823; *Fisher vs. Kuhn*, 54 Miss. 480; *Gulfport Cotton Oil, Fertilizer and Mfg. Co. vs. Reneau*, 94 Miss. 904; *Willis vs. Ellis*, 98 Miss. 197.

The contract was not in violation of the public policy of the state: the debts deemed bad by the banking department were guaranteed by solvent persons.

The banking department could assert the rights of the bank under the contract.

Finally, the case was peculiarly within the jurisdiction of chancery because it would require some training in accountancy to determine exactly the situation of the parties.

J. B. TRULY.

RAILROADS—MISSISSIPPI PRIMA FACIE STATUTE—IN ACTION FOR DEATH, INSTRUCTION PERMITTING INFERENCE OF NEGLIGENCE FROM RAILROAD CROSSING ACCIDENT, ERRONEOUS.—Plaintiffs intestate drove his automobile at a grade crossing in front of a fast approaching train of the defendant and was killed instantly. The driver was alone in the car, but other witnesses saw the accident. The testimony as to whether or not the train was exceeding the statutory speed limit and whether or not the statutory signals were given was conflicting. But it was shown that if the driver had stopped, looked, and listened he would have seen the approaching train. The testimony for the plaintiffs was that no signals were given and for the defendant that all were given. Under these circumstances, at the request of the plaintiffs, the court charged the jury that, if there was such a conflict of fact in the testimony as to prevent them from being able to determine how the injury was inflicted, then they might infer negligence on the part of the defendant and render a verdict for the plaintiffs. HELD: That such instruction was unreasonable, arbitrary, and violative of the due process clause of the Fourteenth Amendment. *Wickton et al. vs. Louisville & N. R. Co.*, 45 Fed. 615.

It is interesting to note that the above instruction is proper in the exact words used above in the latest decisions of the Supreme Court of Mississippi. *Columbus & G. Ry. Co. vs. Lee*, 149 Miss. 543; *Columbus & G. Ry. Co. vs. Fondren*, 154 Miss. 40, 121 So. 838.

Judge Holmes, Federal Judge for the Southern District of Mississippi, rendered the above decision and in discussing the above instruction said that the Mississippi Prima Facie Statute as now construed by our Supreme Court puts the burden upon the defendant to show how the accident occurred in the case of a collision between a locomotive and an automobile. If there is a conflict in the testimony and the jury are unable to say what the truth is or how the accident happened, the presumption requires the verdict to be for the plaintiff. If the evidence is evenly balanced it tips the scales in favor of the plaintiff. The statute does not create merely a "temporary inference of fact,"

that vanishes upon the introduction of some evidence to the contrary, but it creates a presumption "that is given the effect of evidence to be weighed against the opposing testimony."

This construction of the effect of the statute by the Mississippi Supreme Court brings it within the decision of the United States Supreme Court in the case of *Western & Atlantic Railroad vs. Henderson et al.*, 279 U. S. 639, where the Georgia prima facie statute was declared unreasonable, arbitrary, and violative of the due process clause of the Fourteenth Amendment.

While the above decision is only the decision of the District Court and not yet finally adjudicated, it is nevertheless interesting to the members of the Bar in Mississippi. This is true because it demonstrates the uncertainty and danger involved in relying on the statute, especially in the Federal Courts. It seems likely that when a case involving the statute as now construed is properly presented to the Supreme Court of the United States that it will be declared unconstitutional.

It is also interesting to note that the above decision bears out the prediction made by Judge Venable in his article published in the May issue of the Law Journal last year. In that interesting and exhaustive article Judge Venable called attention to the danger and uncertainty in relying upon the statute and also predicted that the statute as now construed would likely be declared unconstitutional.

W. H. INZER.

BOOK REVIEWS

ESSAYS IN JURISPRUDENCE AND THE COMMON LAW. By Arthur L. Goodhart, Cambridge: The University Press; New York: The Macmillan Company, 1931. pp. xiii, 295.

The book to be reviewed, "Essays in Jurisprudence and The Common Law," by Arthur L. Goodhart, is, with the exception of one essay, a series of essays which have appeared in the course of the last four years in legal periodicals throughout the country. Before going any further, I shall give you a little data about the person who has written these delightful essays.

Arthur L. Goodhart is a native of New York City. He was graduated at Yale, and for ten years has been a fellow of Corpus Christi College, Cambridge, and since 1926 has been editor of the *Law Quarterly Review*. Upon the publication of "Essays in Jurisprudence and the Common Law," Mr. Goodhart has been created Doctor of Law at Cambridge, and appointed to the Corpus Professorship of Jurisprudence at Oxford, the first American ever to receive this honor. Incidentally I might mention that he was assistant corporation counsel under the Mitchell administration in New York. Having briefly introduced Mr. Goodhart, we shall now proceed to examine his book.

It consists of thirteen essays. The author in his preface says: "The first seven chapters have been entitled 'Essays in Jurisprudence,' for they are concerned with questions which are, as a rule, examined in the leading textbooks on this ill defined subject. The last six chapters are of a more technical nature; they may, perhaps, be described as dealing with the common law if we use that term in a broad sense as including statute law."

The first essay, "Determining the Ratio Decidendi of a Case," is, I would say, one of the best essays in the book. It was originally delivered as a lecture before the University of London, and is here reprinted from the Yale Law Journal. Ratio decidendi means the reasoning process the court went through in deciding the case. The author first discusses what the text writers and Judges say on the subject, and he then goes into detail about his opinion of the matter. He says: "To determine the principle of a case the first and most essential step is, therefore, to determine what were the material facts on which the judge has based his conclusion. But are there any rules which will help us in isolating these material facts? It is obvious that none can be found which will invariably give us the desired result, for if this were possible then the interpretation of cases, which is one of the most difficult of the arts, would be comparatively easy." He then points out, in a thorough and understandable manner, the way in which the student should go about deducing the principle from the case. He quotes numerous cases and authors on the subjects discussed, and at the end of his essay he lays down fifteen rules for finding the principles that grow out of cases. It is a most enjoyable as well as a most instructive essay, and well worth the time spent in reading it.

In his second essay, "Recent Tendencies in English Jurisprudence," he suggests the many faults in the present day law of England. He suggests, also, the many questions that are arising every day, and leaves the solution

of them to your own imagination. Under this head he discusses questions arising under International Law, Constitutional Law, Law of Torts, Contracts, Company Law or as we call it Corporation Law, Property, Domestic Relation, and Criminal Law.

In the third essay, "Case Law in England and America," he discusses the marked divergence between the English and American attitude of the most characteristic doctrine of the common law—the doctrine of stare decisis. He gives the present day and some of the older opinions on the subject. In this essay the author attempts to show that we are drifting towards the civil law. He gives five good reasons for his assertion.

The remainder of the essays are excellent reading. They are all on interesting subjects. As a matter of fact after reading Mr. Goodhart's essay one wonders why the other law writers do not adopt this clear and interesting style in handling law subjects; for after all, law is one of the most interesting of all studies, and there is no reason why a dry matter of fact style should be adopted to explain it. So deftly does Mr. Goodhart handle his subjects that one would think that he is reading one of Ruskin's essays. Maybe it is Mr. Goodhart's association with our English friends that is the cause of it, but whatever it is, it is well worth while. (An evening spent reading this delightful little book will be an evening spent with a most scholarly and a most cultured gentleman; as well as highly entertaining and instructive.)

J. D. VOLLOR.

How to Find the Law. By Fred A. Eldean, St. Paul, Minnesota: The West Publishing Co., 1931. pp. xxiii, 782.

The first chapters in the text are devoted to giving a general outline of the legal reference materials. The necessary details are given later in connection with the specific situations in which they become important. It is believed that the student will grasp and retain the fundamentals if not overwhelmed at the outset with all the hedging exceptions or detail.

In Chapters 2, 3, and 4, the materials have been developed through a description of how they came into being. Recognition is given in Chapter 2 to the legislative process which is receiving increasing attention on the part of a number of instructors in legal bibliography.

Chapters 5 to 8 discuss the fundamental situation of the lawyer having before him a set of facts requiring a solution. Chapters 5 to 6 describe the processes in connection with legislative materials. The Federal materials are placed first. Each state presents individual problems in the arrangement of the statutory collections. It is easier to present these after the student has grasped certain fundamentals in connection with his study of search in the Federal materials. For similar practical reasons the search involving the use of digests is given in the chapter preceding that dealing with encyclopoedias.

The other chief fundamental search situation is that in which the legal inquirer has found a pertinent precedent and now seeks to supplement or evaluate it. This is discussed in Chapter 9.

Chapter 10 presents an outline of synthesis of methods, which is of great assistance to the student in learning to organize his legal search operations and make them more efficient.

Chapter 11 represents an entirely new departure in books of this type. It is entitled "Business Data for the Lawyer" and has been prepared by Dr. Nathan Isaacs, Professor of Business Law in the Harvard Graduate School of Business Administration, assisted by Mr. George F. Doriot, Professor of Industrial Management in the Harvard School of Business Administration. There is a growing acknowledgment by the courts in the importance of this business material, and the lawyer is constantly concerned with it. The movement in this direction is being recognized by many law schools today in reorganizing their courses.

After the searcher has located the pertinent material for which he has been seeking, he is in a position where he must analyze with a view to evaluating what he has found. While this may bring into play his entire background of knowledge yet it may also require an understanding of what weight to attach to a decision or a statute upon grounds resting wholly upon construction. Certain rules have developed for the interpretation of decisions and statutes. These are discussed in Chapters 12 to 18 by Mr. Eugene Wimbaugh, Professor of Law, Emeritus, Harvard Law School.

With the materials located and evaluated, the inquirer may find that he will want to organize them along with other data into his trial brief. Chapter 18, the Trial Brief, is by Mr. Edson R. Sunderland, Professor of Law, University of Michigan, and Mr. Clifford W. Crandall, Professor of Law, University of Florida.

It is not practicable to set forth within the limits of this text a complete bibliography of American Legal Reference Materials. However, Chapter 20 does present a bibliography of some of the outstanding materials. After giving the Federal and General materials, the states are listed in alphabetical order with a brief outline of the statutes, reports, designation of the courts of last resort, digests, citation books, and local practice books. Instead of grouping the materials according to type as has been the custom, the arrangement has been made wholly upon the basis of states, it being believed that the inquirer usually goes to a bibliography for material with reference to a certain state.

English materials have been treated in a separate section of the book. Chapter 21 is a text discussion and Chapter 22 is a bibliography of the English materials. It has been suggested by several instructors that such an arrangement would eliminate much of the confusion which ensues when one presents the English works in the same chapters with the American.

In order that the student may get practical library experience, problems have been arranged to accompany each chapter. Fifty different problems have been arranged for each job set forth in the chapters, so that each member will have his own individual law library practice. These problems have been bound in a pamphlet to accompany the book, known as the "Student's Note Book." Because these separate problems have been prepared, the number of text illustrations have been cut down to a minimum.

The author, by the use of his informal style, has succeeded in making the subject of Legal Bibliography an interesting one to those who are so fortunate as to study this volume. In the opinion of the reviewer it is the best in its field.

THOMAS FORD COLBERT.

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CASES ON INSURANCE. By William R. Vance. St. Paul, Minnesota: The West Publishing Company, 1931, pp. xiv, 974.

ESSAYS IN JURISPRUDENCE AND THE COMMON LAW. Arthur L. Goodhart, Cambridge: The University Press; New York: The Macmillan Company, 1931, pp. xiii, 295.

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